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Property as a Natural Right and as a Conventional Right in Constitutional Law

BRET BOYCE*

I. INTRODUCTION

The nature and scope of the right to property is one of the most controversial issues of constitutional law, not only in the United States, but throughout the world.¹ Modern U.S. “takings” jurisprudence, which has been characterized by contradictory pronouncements on the constitutional definition of property and a proliferation of seemingly inconsistent categorical and balancing tests, is widely regarded as incoherent. Internationally, as judicial review has gained increasingly wider acceptance, the question of whether the right to property ought to be regarded as a fundamental constitutional right has proved controversial.²

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1. See, e.g., GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 1-2 (2006); André van der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in *PROPERTY AND THE CONSTITUTION* 109, 109 (Janet McLean ed., 1999); Jennifer Nedelsky, *Should Property be Constitutionalized? A Relational and Comparative Approach*, in *PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY* 417, 418-19 (G.E. van Maanen & A.J. van der Walt eds., 1996) [hereinafter *PROPERTY LAW*].

2. For a systematic overview of the international treatment of constitutional property clauses, see generally A.J. VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS* (1999). The right to property has been embraced by many emerging democracies in the developing and ex-communist world, and most recently by communist China, although it remains to be seen how it will be enforced there. See, e.g., *id.* at 322-24 (discussing contentious debate over constitutional property in South Africa); XIAN FA art. 13 (1982) (P.R.C.) (amended Mar. 14, 2004) (“Citizens’ lawful private property is inviolable.”); *id.* art. 10 (“The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned.”). On the other hand, after a lengthy

The intensity of this debate reflects the centrality and uniqueness of the right to property among fundamental rights.³ Historically, the right to private property has been regarded as the central paradigm for rights in general, and the essential precondition for the creation of a private sphere of autonomy that forms the foundation of the pluralistic liberal order. Moreover, to the extent that property rights determine access to the basic means of subsistence, they are the prerequisite to the meaningful exercise of all other rights. But at the same time, the right to property is unique in that the recognition of one person's property rights necessarily implies a restriction on the property rights of others.⁴ Indeed, to the extent that the exercise of other rights, such as the freedom of speech or the right to a fair trial, may depend on possession of property, recognition of private property rights can have a distorting effect on the exercise of those other rights as well. The greater the inequality in the distribution of private property, the more acute this problem becomes.

Recognition of a fundamental right to property thus has profound consequences for the legal order. It is hardly surprising that it has been the subject of intense philosophical and legal controversy throughout history. Since ancient times, this debate focused on the question of whether the right to property is a "natural" right or merely a creation of social convention and positive law. This debate raged from antiquity, through the middle ages, and to the early modern philosophical discussions of Grotius, Pufendorf, Locke, and Rousseau. These discussions in turn exerted a profound influence on the recognition of property as a fundamental right in the first modern written constitutions. Recent controversies in the United States and abroad concerning the nature and scope of the constitutional right to property are in large part a continuation of this unresolved debate.

struggle between Parliament and the courts, India repealed its constitutional guarantee of a fundamental right to property, and more recently Canada and New Zealand decided to omit such a guarantee from their charters of rights. *See generally* TOM ALLEN, *THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS* 43-54 (2000); ALEXANDER, *supra* note 1, at 13, 40-41.

3. *Cf.* ALEXANDER, *supra* note 1, at 4-6 (arguing that separating the public and private sphere is not unique to property rights; rather, property is special because it allocates scarce resources and is foundational for the exercise of other rights).

4. In this respect, the right to property is unlike the right to free speech or a fair trial. *Cf.* LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 142 (2003) ("[T]he creation of a property regime . . . will necessarily protect the interests of some at the expense of the identical interests of others.").

The constitutional right to property emerged during the summer of 1789 when revolutionary assemblies on both sides of the Atlantic drafted the first modern national constitutional charters of rights. In similar language, both the U.S. Bill of Rights and the French Declaration of the Rights of Man and the Citizen proclaimed that the government could not seize property except for public use and on the payment of just compensation.⁵

To some extent, these eighteenth-century guarantees of property rights reflected distinct but largely parallel rhetoric of property as an absolute right in both civil law and common law traditions. At a deeper level, however, the centrality of property rights for the revolutionaries of the eighteenth century was the result of common ways of thinking and common influences. Both revolutions reflected the enlightenment attack on aristocratic privilege and distinctions based purely on birth. Nevertheless, for all their rhetoric of the natural equality of rights, the revolutionaries were equally concerned with protecting the inequalities of property, which they saw as flowing from natural inequalities in ability. Despite their differences, it is useful to view the American and French Revolutions as national expressions of a single revolutionary movement that convulsed the entire Atlantic world.⁶ Comparative study illuminates both the commonalities and the distinctiveness of each.

We are only now beginning to appreciate the complexity and diversity of the intellectual matrix from which the constitutional right to property emerged. The notion that property, as a natural and pre-political right, is the source and paradigm of all other rights is commonly associated with Locke. Certainly this notion exerted a critical influence on the framers, not only in America, as has long been realized,⁷ but also in France, as has more recently

5. U.S. CONST. amend. V; DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 art. 17 *in* STÉPHANE RIALS, *LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN* 26 (1988).

6. *See, e.g.,* R. R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800*, at 4-6 (1969); JACQUES GODECHOT, *FRANCE AND THE ATLANTIC REVOLUTION OF THE EIGHTEENTH CENTURY, 1770-1799*, at 3-7 (Herbert H. Rowen trans., 1965).

7. *See generally* LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (2d ed. 1991) (describing the strong influence of Locke in the United States); *cf.* MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 20-25 (1991) (noting the distinct treatment given to Locke's theory in the United States, as compared to treatment in England).

been recognized.⁸ Locke's assertion that the preservation of property was the "great and *chief end*" of government⁹ resonated profoundly in both countries. Nonetheless, the Lockean rhetoric of property as a natural and absolute right, with its roots in Aristotle and Aquinas, was by no means universally embraced by the eighteenth-century revolutionaries. Alongside this tradition flourished another that regarded the right to property as conventional and thus subject to regulation by society. This competing view can be traced from Plato and the Hellenistic philosophers, through Augustine and William of Ockham, all the way to the Enlightenment. In France, it found expression in Rousseau and his followers, and in America, in the "civic republican" tradition that profoundly influenced figures such as Franklin and Jefferson. Indeed, even within the natural law tradition, to insist that Grotius, Pufendorf, and Locke regarded property as an unqualified natural right is an oversimplification. For Grotius and Pufendorf, property was *both* natural and conventional, while for Locke, property was natural in the state of nature, but conventional in civil society.

Modern constitutional discourse, particularly in the United States, has tended to lose sight of these complexities. Unlike the French Declaration, the U.S. Constitution never explicitly recognized the right of property *per se*, much less as a "natural" right, but was content to protect such property rights as had been created by positive law through the Contract, Due Process, and Takings Clauses. Nevertheless, judicial interpretation over the course of more than two centuries gradually imported natural law concepts, using them to construct doctrines of public use, substantive due process, and regulatory takings. The incoherence of much of modern constitutional property rights jurisprudence is the direct result of the uncritical application of an absolutist rhetoric of natural rights.

This Article explores the emergence and development of the right to property as a fundamental constitutional right with the hope of illuminating these issues. Part Two of this Article surveys the philosophical and legal debate that formed the background for the emergence of the constitutional right to property. It traces the transition from the ancient debate as to whether property as an *in-*

8. RIALS, *supra* note 5, at 13 (recognizing that the drafters of the French Declaration owed "infinitely more" to Locke than to Rousseau).

9. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 368-69 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

stitution was natural or conventional, through the medieval reconceptualization of property as a *right*, to the early modern elaborations of the theories of natural rights and the social contract. Part Three explores in greater detail the intellectual matrix in which property was inscribed as a fundamental right in the first modern constitutions in France and America. Its aim is not to reduce these provisions to a simple "original understanding," but rather to explore the complexities and tensions that animated them. Finally, Part Four explores how the debate over property as a natural or a conventional right continues to shape constitutional doctrine in the United States. The Article concludes that an absolutist rhetoric of property as a purely individual and natural right has tended to impoverish our constitutional discourse, and that a recovery of the notion of property as a conventional, civic, and social right holds the promise of enriching it.

II. THE LEGAL AND PHILOSOPHICAL DEBATE OVER PROPERTY

A. *The Ancient World: Origins of the Debate over Property as a Natural or Conventional Institution*

The ancient debate over property took place against the background of a persistent tradition that early man held all things in common during a primitive Golden Age of abundance.¹⁰ In Greek and Roman literature, this idea first appeared in Hesiod, and recurred repeatedly thereafter throughout the works of classical mythographers, poets, historians, and philosophers.¹¹ The ancients widely associated common property with a primitive natural simplicity, and private property with moral corruption and injustice.¹² The problem was to explain in what sense private property could be justified in accordance with nature, if it was not natural in a chronological sense.

The association between property and moral corruption is central to Plato's thought. Because he believed that property cor-

10. See BODO GATZ, *WELTALTER, GOLDENE ZEIT, UND SINNVERWANDTE VORSTELLUNGEN* (1967).

11. For an exhaustive survey, see ARTHUR O. LOVEJOY & GEORGE BOAS, *PRIMITIVISM AND RELATED IDEAS IN ANTIQUITY* 117-52 (Octagon Books 1965) (1935). For example, in the *Georgics*, Virgil states that in the Golden Age, "it was not even right [*fas*] to mark off or to divide the land with boundaries." *Id.* at 370 (quoting VIRGIL, *GEORGICS* I 126-27 (Otto Ribbeck ed., Leipzig 1898)).

12. See LOVEJOY & BOAS, *supra* note 11, at 119.

rupts, Plato concluded that the rulers of an ideal state should have no property.¹³ In his *Republic*, he famously forbade the Guardians or ruling caste in his ideal state to possess any property in land, houses, or money.¹⁴ In Plato's view, if the rulers possess property, they will place their personal interests above the common welfare;¹⁵ by prohibiting it, he sought to prevent quarrels and factionalism and insure unity in the state.¹⁶ Among the lower classes, such as farmers, craftsmen, and traders, which comprised the vast bulk of the people, he suggested that private property should be allowed, but extremes of wealth and poverty must be prevented.¹⁷

In the *Laws*, where Plato attempted to prescribe rules for a practical rather than an ideal state, he recognized that the ideal of the community of Guardians in the *Republic*, where "every sort of property is common," and "every device has been employed to exclude the 'private' from all aspects of life," may be unattainable.¹⁸ For such a state to function, its inhabitants must be either "gods or children of gods."¹⁹ In the *Laws*, therefore, he elaborated a "second-best" alternative, one that is as close to the perfect state as practicable.²⁰ All land in the state should be divided into roughly equal private allotments, one for each household.²¹ However, the individual shareholders may not sell any part of their allotments and must treat them like state property, even though the state may not confiscate them. Furthermore, accumulation of chattels is subject to strict limitations.²²

Aristotle, in the *Politics*, attacked these egalitarian proposals and defended the institution of private property. Aristotle argued that Plato's attempt to secure complete unity in the state was impossible; in order to be self-sufficient, a state must consist of a plu-

13. PLATO, *THE REPUBLIC* 184 (Desmond Lee trans., Penguin Books 1974).

14. *Id.*

15. *Id.* at 185.

16. *Id.* at 249-50.

17. *Id.* at 187-88.

18. PLATO, *THE LAWS OF PLATO* 126 (Thomas L. Pangle trans., 1980).

19. *Id.* at 126.

20. *Id.* at 125-26.

21. *Id.* at 126-27.

22. *Id.* at 127, 247. The system of land allotments and restrictions on alienation outlined in Plato's laws appears to reflect widespread early practice in a number of early Greek jurisdictions, including Sparta, Locri, Crete, and most likely early Athens as well. See GLENN R. MORROW, *PLATO'S CRETAN CITY: A HISTORICAL INTERPRETATION OF THE LAWS* 107-09 (2d. ed. 1993) (1960).

reality of different kinds of men.²³ Aristotle also briefly introduces a utilitarian argument that is the ancestor of most modern defenses of private property. Aristotle observed: "People are much more careful of their own possessions than of those communally owned; they exercise care over public property only in so far as they are personally affected."²⁴ The argument that a common ownership creates a disincentive for efficient use of property (the "tragedy of the commons") is the centerpiece of the economic argument for private ownership today; but for Aristotle it was of rather marginal importance.²⁵ Finally, Aristotle adduced psychological and ethical arguments in support of private property: it satisfied an innate human urge to possess, and enabled people to engage in private acts of generosity.²⁶

Although Aristotle defended the institution of private property, he was far from espousing modern notions of property as a human right. Indeed, the *Politics* opens with a defense of slavery, the idea that some human beings are without rights, as a natural institution: "It is clear that by nature some are free, others are slaves, and for these it is both right and expedient that they should serve as slaves."²⁷ Aristotle's natural slavery is rooted in racial differences. In his words, "as the poets say, 'It is proper that Hellenes should rule over barbarians,' meaning that barbarian and slave are by nature identical."²⁸ If these "barbarians" should refuse to submit, Aristotle suggests, it is "part of nature's plan" and "by nature right" to hunt them down and enslave them.²⁹ The link between property and slavery as "natural" institutions would persist to the time of Locke, Madison, and beyond.

The quarrel between Plato and Aristotle framed the terms of subsequent debate over the institution of private property. The central questions of this debate were whether this institution was "natural," and what it means for an institution to be "natural."

23. ARISTOTLE, *THE POLITICS* 56-58 (T.A. Sinclair trans., Penguin Books 1962).

24. *Id.* at 58.

25. As one commentator has observed, in the *Politics* the utilitarian justification of property "appears as a marginal point and is not emphasized; when Aristotle constructed his own sketch for a perfect state he paid little heed to his own argument that private property is necessary as an incentive to work: he made half the land of the state public property and stipulated that it should be tilled by public slaves." RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 15 (1951).

26. ARISTOTLE, *supra* note 23, at 63-64.

27. *Id.* at 34.

28. *Id.* at 26-27.

29. *Id.* at 40.

Unlike Aristotle, the philosophical movements that dominated the Hellenistic and Roman worlds until the triumph of Christianity generally held that the institution of private property is not natural. This was the position of the Cynics,³⁰ the Epicureans,³¹ and most influentially, the Stoics.³² As Seneca explained, private property arose only because avarice led people to seek more than nature and reason require.³³ The divergent views of ancient philosophers on the question of whether private property is "natural" reflect the differing understandings of the term "nature" itself.³⁴ The primary etymological meaning of "nature" is origin or birth.³⁵ This is the sense in which property is said to be unnatural according to the myth of the Golden Age, viewed as a reflection of a historical stage in which humankind lived without private property. But in literary and philosophical usage, "nature" comes to be associated with the essential qualities of a person, thing, or institution.³⁶ In *The Republic*, Plato identifies "nature" with the ideal;³⁷ thus private property, which undermines the unity essential to the ideal state, is unnatural. In the *Politics*, Aristotle understands "nature" teleologically: "[W]hatever is the end-product of the perfecting process of any object, that we call its nature Moreover, the aim and the end can only be that which is best, perfection; and self-sufficiency is both end and perfection."³⁸ Thus, Aristotle concluded that private property is natural because he believed that it is required for the state to be self-sufficient. The Stoics identified "nature" with reason (the *logos*).³⁹ Private property does not arise naturally, but only when irrational avarice leads people to seek more than nature and reason require.

Of all these philosophical approaches, Stoicism exerted the most profound influence over Roman legal thinking. Like Cyni-

30. See generally LOVEJOY & BOAS, *supra* note 11, at 117-52.

31. *Id.* at 233 (quoting LUCRETIUS, DE RERUM NATURA 5.1113-19 (Merrill 1907)).

32. See generally *id.* at 273 (quoting SENECA, EPISTOLAE MORALES 90.34 (Otto Hense ed., Leipzig 1914)).

33. *Id.* at 271 (quoting SENECA, EPISTOLAE MORALES 90.10 (Otto Hense ed., Leipzig 1914)).

34. Lovejoy and Boas identified sixty-six different meanings of this term (Greek *phusis*, Latin *natura*). See *id.* at 447-56.

35. *Id.* at 447.

36. *Id.* app. A2, at 447.

37. PLATO, THE REPUBLIC, *supra* note 13, at 424.

38. ARISTOTLE, *supra* note 23, at 28.

39. See LOVEJOY & BOAS, *supra* note 11, at 270-71 (quoting SENECA, EPISTOLAE MORALES 90.10, 24 (Otto Hense ed., Leipzig 1914)).

cism and Epicureanism, Stoicism was originally potentially a socially subversive philosophy; but unlike them, it was not implacably hostile to engagement in politics. In fact, it was eventually pressed into the service of the Roman State as a quasi-official imperial ideology. The philosophers of the middle Stoa, such as Panætius, Posidonius, and Polybius, became apologists for oligarchic imperial government and saw the emergence of the Roman Cosmopolis as the fulfillment of a divine plan.⁴⁰ In the early Roman Empire, eclectic Stoics such as Seneca discarded the school's earlier advocacy of a mixed constitution and championed instead an enlightened absolutism.⁴¹ The Stoic doctrines of the brotherhood of man and universal law of reason also had a certain expediency in the context of the worldwide Roman Empire. This insured its wide diffusion alongside other perhaps less expedient and even more potentially subversive ideas, such as the notion that human equality is natural and private property is not.⁴²

The influence of Stoic doctrines of property on Roman law was nevertheless at best partial and incomplete. It is true that the great jurist Ulpian repeated the Stoic doctrine that all men are equal according to natural law.⁴³ Likewise, the *Institutes* of Justinian insisted that slavery is contrary to natural law (*ius naturale*) and is merely the result of social convention, albeit one recognized in the law of all nations (*ius gentium*) in the ancient world.⁴⁴ But elsewhere, unfortunately, Roman jurists did not always so clearly distinguish between the *ius naturale* and the *ius gentium*. In fact, immediately before asserting that slavery is a creation of the *ius gentium* and not the *ius naturale*, the *Institutes* defined the latter in a way that conflates it with the former: "The law which natural reason appoints for all mankind obtains equally among all nations,

40. See BENJAMIN FARRINGTON, *SCIENCE AND POLITICS IN THE ANCIENT WORLD* 172-216 (2d ed. 1965).

41. See DONALD R. DUDLEY, *A HISTORY OF CYNICISM: FROM DIGOENES TO THE 6TH CENTURY A.D.*, at 128-29 (1937); MIRIAM T. GRIFFIN, *SENECA: A PHILOSOPHER IN POLITICS* 141-48 (1976); cf. CHARLES HOWARD MCILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST: FROM THE GREEKS TO THE END OF THE MIDDLE AGES* 105-06 (12th prtg. 1960).

42. MCILWAIN, *supra* note 41, at 106.

43. "Quod ad ius naturale attinet, omnes homines aequales sunt." ("As far as natural law is concerned all men are equal.") ("As far as concerns the civil law slaves are regarded as not existing, not, however, in the natural law, because as far as concerns the natural law all men are equal.") DIG. 50.17.32 (Ulpian, Sabinus 43) (Theodor Mommsen et al. eds., 1985).

44. See J. INST. 1.3.2; 1.2.2.

and is called the law of nations, because all nations make use of it."⁴⁵ The authors of the *Institutes* apparently did not feel the need to explain the apparent conflict between their assertion that slavery is contrary to natural law and their implication that as a creation of the law of nations, slavery reflects natural reason.

This confusion in the Roman legal literature is even more acute when we turn from discussions of slavery to discussions of property in general. The Roman legal sources appear to be hopelessly inconsistent as to whether the institution of private property is natural or conventional.⁴⁶ To some extent, this may reflect differences of opinion among different legal authorities. The compilers of Justinian's *Corpus Iuris Civilis* were more concerned with practical rather than with theoretical consistency (although, of course, they did not always succeed in achieving even the former).⁴⁷ But to some extent it reflects confusion or carelessness of the original authorities themselves. For example, Gaius clearly treats natural and conventional law fairly indiscriminately.⁴⁸ Other authorities, such as Ulpian, seem to draw a distinction between the two, even if they do not pursue it in a systematic way. At least one passage in the *Digest* of Justinian, attributed to Hermogenianus, seems to draw the distinction more clearly and to suggest that private property is a creation of the *ius gentium* rather than the *ius naturale*.⁴⁹ The most we can conclude from this is that the Stoic theory of property was only incompletely incorporated into Roman legal doctrine.

The specific question of expropriation, which is the focus of much of the modern debate over constitutional property rights, received little sustained discussion in the Roman legal literature.

45. See J. INST. 1.2.1. This formulation is taken almost verbatim from Gaius. See G. INST. 1.1 (F. de Zulueta ed.).

46. See SCHLATTER, *supra* note 25, at 27-30.

47. See *id.* at 27.

48. As Schlatter notes, in the *Institutes*, Gaius treats acquisition by occupation, accession, and tradition as belonging to the *ius naturale*, but in other treatises that have been excerpted in the *Digest*, he states that they belong to the *ius gentium*. *Id.* at 27.

49. DIG. 1.1.5 (Hermogenian, Epitome of Law 1) (Theodor Mommsen et al. eds., 1985) ("Ex hoc iure gentium introducta bella, discretæ gentes, regna condita, dominia distincta, agris termini positi" ["As a consequence of this *jus gentium*, wars were introduced, nations differentiated, kingdoms founded, properties individuated"]). Carlyle suggested that this passage seems to indicate that Hermogenianus considered private property conventional rather than natural. See R.W. & A.J. CARLYLE, *The Second Century to the Ninth*, in A HISTORY OF MEDIAEVAL POLITICAL THEORY IN THE WEST: VOL. I, at 42, 53-54 (3d ed. 1930).

That literature is overwhelmingly concerned with private law. To attempt an exposition of public law, which was far more dependent than private law on the whim of the emperor, would have been at best somewhat pointless and at worst even dangerous. But there can be little doubt that the Roman state exercised the power of eminent domain, for "it is impossible to believe that the construction of the Roman roads, extending in a straight line from one end of the Empire to the other, or of the Roman aqueducts, was at the mercy of the owners of the land through which they were to pass."⁵⁰ Expropriation for redistributive purposes also loomed large throughout Roman history, whether to alleviate economic distress, to reward veterans for military service, or merely to settle scores or to gain political advantage. Many of these transfers involved *ager publicus*—land initially acquired by the Roman state in the course of its expansion and in which the state retained a reversionary interest.⁵¹ Compensation appears to have been generally paid in the case of public works but not redistribution.⁵² Regulation of property uses was also widespread and was not accompanied by compensation.⁵³

The Roman law of property, therefore, had a strong component of social obligation. The common claim that ownership in Roman law was purely individualistic and absolute—which continues to be repeated even in our own day⁵⁴ despite having been debunked more than a century ago by Jhering⁵⁵—cannot be squared with historical facts. That it could be regarded as plausible is a consequence of the almost exclusively private law focus of the Roman legal writers, which led them to neglect issues of government regulation and expropriation.⁵⁶ The natural law theorists of the seventeenth and eighteenth centuries, in their enthusiasm to strengthen private property as a weapon in the struggle against feudalism and absolutism, "turned to the Roman law for the support they were

50. J. Walter Jones, *Expropriation in Roman Law*, 45 L.Q. REV. 512, 521 (1929).

51. *See id.* at 514-16.

52. *See id.* at 516.

53. *See id.* at 518.

54. *See, e.g.,* RICHARD PIPES, PROPERTY AND FREEDOM 11 (1999) ("The rights implicit in *dominium* were so absolute that ancient Rome knew nothing of eminent domain.").

55. RUDOLF VON IHERING, LAW AS A MEANS TO AN END 386-87 (Isaac Husik tr. 1968) (1913) (German original 1877).

56. Jones, *supra* note 50, at 519-20, 526.

determined to find,"⁵⁷ and rested their arguments on the supposed doctrine of the inviolability of property that was in fact largely the creation of the glossators and commentators.⁵⁸ If Roman law did not fully embrace the Stoic idea that private property is contrary to nature, neither did it embrace the conceit of Bartolus and Blackstone that the rights of ownership are absolute.

Although the ancient debate over whether private property is "natural" still has enormous resonance in modern times, we must not lose sight of the important ways in which ancient conceptions of property differed from our own. First, the ancients conceived of the role of property primarily in civic or social rather than economic terms. In antiquity, private property, which essentially meant land, was a largely static institution that had little in common with our modern dynamic capitalist conception of property. Its goal was autarky rather than wealth maximization. In Greece, land ownership was "an exclusive prerogative of citizens";⁵⁹ it was the basis of the Solonic classes in Athens and thus determined civic rights and responsibilities.⁶⁰ Similarly, it was the basis of the system of honorific orders in Rome and largely determined social and political privileges.⁶¹ The pursuit of profit through investment or commerce was considered unsuitable for leading citizens. Their wealth furnished them with the leisure to pursue the good of the state but was not a goal in itself.⁶² As Moses Finley has put it: "Investment in land . . . was never in antiquity a matter of systematic, calculated policy, of what Weber called economic rationality."⁶³ Indeed, there was no "recognizable real-property market" in the modern sense.⁶⁴ Ownership of property in land was bound up with civic and political participation in ways that still seemed familiar in the eighteenth century, when the first written constitutions emerged, but that seem alien today in the twenty-first.

57. *Id.* at 520.

58. *Id.* at 519-20.

59. M. I. FINLEY, *THE ANCIENT ECONOMY* 48 (updated ed. 1999).

60. *See id.* at 48-49.

61. *See generally id.* at 44-46 (describing the evolution of the categories of social division in the Roman world, which viewed property ownership not as an "occupation," but rather an unstated prerequisite for being classified in the higher levels of society).

62. *See id.* at 49-50 (describing the middle class, who were businessmen, engaging in various business activities in communities where the very same businessmen were collecting taxes for the state).

63. *Id.* at 117, 144.

64. *Id.* at 118.

Second, even if Aristotle and some of the Roman jurists regarded the institution of property as natural, it does not necessarily follow that they had a conception of property as a natural *right*, much less a fundamental or universal *human right*. Indeed, it has often been argued that the ancients lacked a conception of “rights” in the modern sense at all; certainly they had no counterpart to our modern discourse of rights.⁶⁵ Arguably, the jurists such as Ulpian who incorporated Stoic conceptions of freedom, equality, and human dignity into the doctrines of Roman law laid the groundwork for our modern notions of human rights.⁶⁶ But it remains true that, on the whole, the Roman jurists never distinguished clearly between positive and natural law, and “never developed what may be called the revolutionary aspect of natural law as a higher law capable of invalidating the positive law.”⁶⁷ The emergence of a discourse on fundamental rights, and in particular of the notion of property as a fundamental right, was a development of medieval and early modern thought.

B. The Middle Ages and the Emergence of the Individual Right to Property

The early Christian Church, like many of the pagan philosophers, was deeply critical of private property. Jesus counseled those seeking salvation to renounce their property,⁶⁸ and following his precepts, the earliest Christians rejected private property and held “all things in common.”⁶⁹ The early Church Fathers drew on these Christian teachings as well as their Stoic antecedents to develop a theoretical argument that private property is contrary to nature.⁷⁰ For them, the pagan Golden Age corresponded to the biblical Garden of Eden.⁷¹ Saint Ambrose took directly from

65. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); MICHEL VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* 227-39 (4th ed. 1975); LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 120-21 (1953). One recent study has taken issue with these views, arguing that Aristotle did possess a concept of rights based on natural justice. FRED D. MILLER, JR., *NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE'S POLITICS* 88-89 (1995). But Miller concedes that Aristotle did not conceive of such rights as inherent, inalienable, or universal. *Id.* at 88.

66. See TONY HONORÉ, *ULPIAN: PIONEER OF HUMAN RIGHTS* 76 (2d ed. 2002).

67. BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 55 (1962).

68. *Matthew* 19:21; cf. *id.* 19:24; 6:19; 10:9-10; *Luke* 3:11; 12:33; 18:22.

69. *Acts* 4:32; see also *id.* 2:44-45 (“Now all those who believed . . . had all things in common, and sold their possessions and goods.”)

70. SCHLATTER, *supra* note 25, at 33-34.

71. *Id.* at 35.

Cicero and the Stoics the idea that by nature all things are held in common. Saint Augustine elaborated the doctrine that private property is the result of sin and the "Fall of Man."⁷² But Augustine rejected the claim that Christians are forbidden from owning property: Although property is not a creation of natural law, it is sanctioned by human law. Nevertheless, Augustine insists that ownership is contingent upon righteous use.⁷³ Accordingly, the property of heretics is subject to confiscation because "all that which is badly possessed is the property of another."⁷⁴ Thus for Augustine, private property is "neither absolute nor inviolable, but relative and conditional."⁷⁵

By the later Middle Ages, however, the Church had largely reconciled itself to the institution of private property. Saint Thomas Aquinas explained that an institution can be natural in one of two ways: It can either exist in the original state of nature or it can be dictated by natural reason because it is beneficial.⁷⁶ It is in this second sense, according to the Angelic Doctor, that both private property and slavery are natural: "[T]he distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life. Accordingly, the law of nature was not changed in this respect, except by addition."⁷⁷ In the *Summa Theologica*, Aquinas repeated all of the arguments of Aristotle in favor of private property. But he did not develop them much further. In his concept of the state, "there was no place for a theory of individual rights. The ruler was bound by natural law to maintain the general system of private ownership . . . but he was not bound to respect as a natural right the property of any one man."⁷⁸ His pupils, particularly Aegidius Romanus, sought to provide further support to his theory that private property is natural by appealing to the idea of the social contract.⁷⁹ At the same time, Aegidius developed the theory, pioneered by Augustine, of do-

72. *Id.* at 35-38.

73. *Id.* at 38.

74. *Id.* (quoting AUGUSTINE, PATROLOGIAE LATINAE, vol. 33, letter 153, 6, 26, translated in Richard McKeon, *The Development of the Concept of Property*, in 48 ETHICS 297 (1938)).

75. D.J. MacQueen, *St. Augustine's Concept of Property Ownership*, in 8 RECHERCHES AUGUSTINIENNES 187, 220 (1972).

76. See THOMAS AQUINAS, 1 SUMMA THEOLOGICA, Q. 94, art. 5, at 65 (1949).

77. *Id.* at 65.

78. SCHLATTER, *supra* note 25, at 50.

79. *Id.* at 58; see J.W. GOUGH, *THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT* 41-42 (1936).

minion in grace—the idea that all ownership rights depend ultimately upon God, and therefore upon righteous conduct.⁸⁰

The most important theological contributions to the development of the theory of individual rights and of the rights of property in particular came not from the Dominican Aquinas and his pupils but from their rivals, the Franciscans. According to Michel Villey, the Franciscan Order was the cradle and William of Ockham was the “father” of the modern concept of subjective rights.⁸¹ For Ockham, property is not natural but rather a creation of human positive law. Nevertheless, property is immune from expropriation by both pope and emperor. More recent scholarship, without disputing the importance of Ockham, has argued that the development of subjective rights was a more gradual process than Villey suggested.⁸² In any case, by the later Middle Ages, a concept of subjective individual rights had clearly emerged, which was to provide the foundation for modern individualistic theories of property rights.

Alongside these theological discussions, the rediscovery and ensuing revival of Roman law in the eleventh century also led to important developments in the theory of property rights. The Romanist jurists of the late middle ages, unlike the Romans themselves, first felt the need to articulate an abstract definition of property. Beginning with Bartolus in the fourteenth century, they defined property (*dominium*) as “the right of complete control over a physical object, to the extent not prohibited by law” (*ius de re corporali perfecte disponendi nisi lege prohibeatur*).⁸³ This definition is repeated with minor modifications from one civilian authority to the next through Domat and Pothier to the French Civil Code of 1804, and from there in the other modern codes of the civilian tradition.⁸⁴ It is echoed in the common law in the even more

80. SCHLATTER, *supra* note 25, at 62.

81. VILLEY, *supra* note 65, at 226; *cf. id.* at 176-262.

82. See generally BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625*, at 151-153 (John Witte, Jr. ed., 1997) (describing the philosopher Bonagratia of Bergamo's theory of property).

83. ALFONS BÜRGE, *DAS FRANZÖSISCHE PRIVATRECHT IM 19. JAHRHUNDERT: ZWISCHEN TRADITION UND PANDEKTENWISSENSCHAFT, LIBERALISMUS UND ETATISMUS* 5 (1991) (quoting BARTOLUS, COMMENTARY on DIG. 41.2.17); *cf. id.* at 3-63.

84. “La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse un usage prohibé par les lois ou par les règlements.” [“Property is the right to enjoy and dispose of things in the most absolute manner provided that the use is not prohibited by laws or regulations.”]. C. CIV. art. 544 (Fr.).

extravagant language of Blackstone. But in addition to this definition applying rather narrowly to ownership of tangible property, Bartolus also offers a second and broader definition of *dominium*. Property, he says, "may be used to refer in the broadest sense to every incorporeal right, as in 'I have property in an obligation, for example in a usufruct.'" (*potest appellari largissime pro omni iure incorporali, ut habeo dominium obligationis, utputa usufructus*).⁸⁵ This broader definition would in time find an echo in Locke.⁸⁶

The medieval Romanists were also concerned with articulating general principles governing the limits of private property rights and expropriation in particular. As we have seen, the surviving Roman sources do not provide a general theory of expropriation, although they provide glimpses of expropriation procedures governing particular situations (such as the building of aqueducts).⁸⁷ At most, they furnish a variety of seemingly contradictory principles, such as *Princeps legibus solutus est*⁸⁸ (the sovereign is not bound by laws) and *Digna vox maiestate regnantis legibus alligatum se principem profiteri*⁸⁹ (it befits the majesty of the ruler for the sovereign to profess himself to be bound by the laws). The medieval canonists and Romanists, concerned above all with constructing a consistent theory out of such contradictory statements, gradually developed a general theory of expropriation.⁹⁰

Feudalism, with its complex network of overlapping rights of kings, manorial lords, ecclesiastical authorities, and municipalities, formed the political and socioeconomic background for this development.⁹¹ In France, despite the increasing centralization of power in the hands of the king, these overlapping jurisdictions characteristic of feudalism continued to play an important role in the law of property until the end of the *ancien régime*, ensuring a wide diversity of approaches to expropriation. Some jurisdictions applied an extremely lax standard of public utility, while in others a strict

85. E.J.H. Schrage, *Ius in re corporali perfecte disponendi: Property from Bartolus to the New Dutch Civil Code of 1992*, in PROPERTY LAW, *supra* note 1, at 44 (quoting BARTOLUS, COMMENTARY on DIG. 41.2.17 (no. 4)) (I have supplied my own translation of Bartolus).

86. See *infra* notes 134-35 and accompanying text.

87. See Jones, *supra* note 50, at 521-22.

88. DIG. 1.3.31 (Ulpian, Lex Julia et Papia 13).

89. CODE JUST. 1.14.4 (Theodosius & Valentinian-Caesar 429).

90. This evolution is traced in detail in UGO NICOLINI, *LA PROPRIETÀ, IL PRINCIPE, E L'ESPROPRIAZIONE PER PUBBLICA UTILITÀ* (1952).

91. See Jean-Louis Mestre, *L'Expropriation Face à la Propriété (Du Moyen Age au Code Civil)*, in 1 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 53 (1985).

standard of public necessity prevailed. Compensation was sometimes forthcoming immediately, and in some jurisdictions exceeded the market value of the property; elsewhere the victims of expropriation had to wait decades for compensation, and sometimes funds for compensation were simply unavailable.⁹² However, the general rule was well established, at least in theory: Property could only be taken for public utility or necessity, and only upon payment of just compensation.

In England, where the feudal system, originally the strongest in Europe, disintegrated more rapidly than on the continent, Parliament increasingly claimed a monopoly of the power to expropriate. Although the King exercised certain prerogative powers over private property (primarily in connection with his authority over defense, foreign affairs, and navigation) without the need to pay compensation or secure the consent of Parliament, these powers were limited in scope and did not include the power to acquire estates in land.⁹³ The Crown recognized formal limitations on such powers beginning in 1215, when the barons extracted from King John the promise that "no free man shall be . . . disseised . . . save by the lawful judgment of his peers or the law of the land."⁹⁴ The power of eminent domain, on the other hand, belonged exclusively to Parliament, at least by the fifteenth century.⁹⁵ As a formal matter, no independent requirement of public use or of compensation limited this power: any such limitation would be inconsistent with parliamentary sovereignty. In practice, however, compensation was generally paid and the courts tended to presume that compensation was intended, absent clear evidence to the contrary. The theoretical justification for this exclusive power was increasingly found in social contractarian theories of limited government. A critical figure in these theoretical developments was Sir John Fortescue, the fifteenth-century Chief Justice of the Court of

92. In Provence, for example, those whose lands were expropriated regularly received a twenty percent premium (*le "quint en sus"*) over the fair market value of their property. In Lille, on the other hand, compensation to owners of property taken when the city was enlarged in 1668 was only paid in 1732. In 1783, at least fifteen administrative districts lacked adequate funds to compensate property owners for expropriation. *See id.* at 60-61.

93. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562-64 (1972).

94. MAGNA CARTA ch. 39 (Nancy Troutman ed., National Public Telecomputing Network n.d.) (1215), available at <http://www.constitution.org/eng/magnacar.htm>. This provision is the ultimate ancestor of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

95. *See* Stoebuck, *supra* note 93, at 565-66.

King's Bench, who paved the way for early modern approaches to property rights.⁹⁶

C. Early Modern Theories of Property Rights

1. Grotius and Pufendorf

Modern natural rights theories of property began with Hugo Grotius. Grotius was the first modern philosopher of law to decouple the theory of natural rights from theology. In his prolegomena to the *De Jure Belli ac Pacis*, Grotius famously states that natural law "would have a degree of validity even if we were to concede [*etiamsi daremus*] that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."⁹⁷ Unlike medieval Catholic theologians such as Augustine, Aquinas, and Ockham, the early modern Protestant theoreticians such as Grotius, Pufendorf, Locke, and Rousseau, although also profoundly religious, were nonetheless concerned with framing their arguments in a universal manner that could appeal to adherents of all religious beliefs. For the medieval mind, the central question was: How could man own property, if the entire universe belonged to its creator God alone? For the modern mind, on the other hand, the question was: How could an individual human have a right to property that other humans are bound to respect? While medieval thought stressed the duty of the owner to use property in accordance with the purposes of God (its ultimate owner), modern thought increasingly stressed the freedom of the owner to use property as he saw fit, provided that he did not infringe the rights of others.⁹⁸ Thus, the separation of law from theology signaled both a revival of the ancient Stoic conception of natural law as the embodiment of universal reason⁹⁹ and

96. See CHARLES HOWARD MCILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* 354-63 (12th prtg. 1960).

97. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (1625), reprinted in 2 *CLASSICS OF INTERNATIONAL LAW* 1, 13 (James Brown Scott ed., Francis W. Kelsey et al. trans., 1964).

98. Cf. Marie-France Renoux-Zagamé, *Du droit de Dieu au droit de l'homme: Sur les origines théologiques du concept moderne de propriété*, in 1 *DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE* 17, 31 (1985) ("In a world from which God has withdrawn . . . man no longer has a right-as-duty, but a right-as-freedom.").

99. See generally GROTIUS AND THE STOA (Hans W. Blom & Laurens Winkel eds., 2004).

strengthened the position that the rights of ownership are absolute.

Nevertheless, Grotius' rationalism does not signal a rejection of reliance on authority. In fact, the appeal to sacred and secular authority was central to Grotius' method. Grotius continued the identification (or confusion) of natural law with the law of nations that originated in Roman law and persisted throughout the Middle Ages. According to Grotius, there are two approaches of showing that a given proposition is a part of natural law: the *a priori* method and the *a posteriori* method. While the *a priori* method deduces the principles of natural law directly from the requirements of a "rational and social nature," the *a posteriori* method argues that, in all probability, those principles are the ones "believed to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause."¹⁰⁰ Although in principle Grotius admits that the equation of natural law with the law of nations is not infallible, it is nonetheless a cornerstone, and arguably a serious weakness, of his approach.¹⁰¹

Unsurprisingly, given this approach, Grotius accepts the ancient theory of the original community of goods in the Golden Age, which he finds confirmed in both biblical and pagan authorities.¹⁰² Hence, Grotius needs to explain how private property arose from this original community. Private property, he observes, cannot be created by a unilateral subjective action, "by a mere act of will," but only "by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his property."¹⁰³ Thus, Grotius' theory of the origin of property rights is essentially contractarian.

However, because Grotius views private property as a conventional institution established to serve specific rational social

100. GROTIUS, *supra* note 97, at 42. Already in the *De Jure Praedae* Grotius had gone even further and suggested that natural law may be divined by consulting to the eminent authorities. See HUGO GROTIUS, *DE JURE PRAEDAE COMMENTARIUS* (1604), reprinted in *CLASSICS OF INTERNATIONAL LAW* 1, 226 (Gladys L. Williams & Walter H. Zeydel trans., 1964).

101. See STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 5-6 (1991).

102. See GROTIUS, *supra* note 97, at 186-87.

103. *Id.* at 189-90.

ends, he holds that it is limited by those ends. These limitations are manifest in his doctrine of the revival of the common right to use in cases of extreme necessity and his doctrine of eminent domain. Grotius maintains that those who have more property than they need can be compelled to share their belongings with persons who, through no fault of their own, find themselves in extreme distress. For Grotius, this right of necessity is rooted in an implicit limitation in the original compact that created private property.¹⁰⁴ That compact must be construed narrowly so as to derogate as little as possible from the original common right of use, and thus "in direst need the primitive right of user revives, as if community of ownership had remained."¹⁰⁵ But Grotius stresses that this revived right of use must be subject to restrictions. The distressed party must first seek the owner's permission or judicial approval; the owner must not be in an equal state of distress; and the distressed party must make restitution whenever possible.¹⁰⁶

Grotius is also credited with the invention of the term "eminent domain" (*jus* or *dominium eminens*), which implies that public rights always overlap with private rights to property, and in the case of public utility, public rights take precedence.¹⁰⁷ Thus, "for the common good the king has a right of property over the possessions of individuals greater than that of the individual owners."¹⁰⁸ Grotius sets two conditions on the exercise of the power of eminent domain: "[T]he first requisite is public advantage; then, that compensation from the public funds be made, if possible, to the one who has lost his right."¹⁰⁹

Pufendorf takes a similar approach. Like Grotius, he cites both biblical and classical authorities as evidence for the primitive community of goods.¹¹⁰ It is thus clear that property is not natural in the sense of existing in the state of nature or being required by the law of nature.¹¹¹ Rather, private property is a conventional in-

104. *Id.* at 193.

105. *Id.*

106. *Id.* at 194-95.

107. *Id.* at 36.

108. *Id.*

109. *Id.* at 385.

110. SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (1672), in 2 *CLASSICS OF INTERNATIONAL LAW* 1, 547-55 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., 1964) (discussing biblical accounts); *id.* at 542-45 (discussing classical accounts).

111. *Id.* at 537.

stitution resting on "tacit or express" agreements which determine its extent.¹¹² At most, private property is natural in the limited or secondary sense that it is useful or advantageous and consistent with man's reason and social nature.¹¹³ In discussing the social advantages of a system of private property, Pufendorf relies explicitly on the same arguments as Aristotle.¹¹⁴ In Pufendorf's view, the most important of these are the claims that private property prevents quarrels and promotes industry.¹¹⁵ He also cites approvingly Aristotle's argument that private property enables owners to engage in acts of generosity.¹¹⁶

Pufendorf, like Grotius, recognizes that the rights of property owners are not absolute but involve definite social responsibilities. He emphasizes that private property was not established merely for "the purpose of allowing a man to avoid using it in the service of others, and to brood in solitude over his hoard of riches."¹¹⁷ Thus, like Grotius, he recognizes that those in extreme need may have a right to the property of others.¹¹⁸ However, he differs slightly from his Dutch predecessor as to the theory on which such a right is based and the conditions under which it may be exercised.¹¹⁹ Pufendorf also discusses the theory of eminent domain at greater length than Grotius. He distinguishes between absolute monarchies and states in which the government has only limited power. Taking issue with Hobbes, Pufendorf argues that only in the former does government have untrammelled power to seize the possessions of its subjects at its pleasure and without compensation. He suggests that such a state of affairs is typical of oriental despotism and "is the reason why those lands, otherwise so favoured, are daily sinking lower in ignorance, barbarity and poverty, or at least do not enjoy the prosperity seen in most of the kingdoms of Europe."¹²⁰ Under European limited governments, on the other hand, the sovereign has "only so much power" over the

112. *See id.*

113. *See id.*

114. *Id.* at 541.

115. *Id.* at 301.

116. *Id.* at 541.

117. *Id.* at 301.

118. *Id.* at 302.

119. *See id.* at 301-07. Pufendorf differs with Grotius in preferring to treat this right of necessity as a positive right rather than a revival of the original natural use right. He also stresses that such a right can only be claimed by one who falls into a state of necessity through no fault of his own. For further discussion, see BUCKLE, *supra* note 101, at 108-17.

120. PUFENDORF, *supra* note 110, at 1275.

property of citizens "as flows of itself from the nature of supreme sovereignty, unless the citizens of themselves have voluntarily given up more."¹²¹ These powers are threefold: taxation, eminent domain, and regulation of the use of property (for example, by sumptuary laws).¹²²

According to Pufendorf, the conditions for the exercise of eminent domain are necessity and compensation. Although Pufendorf's "necessity" might seem at first sight a stricter standard for expropriation than Grotius' "public advantage," Pufendorf is in fact somewhat vague on this point. He is content to insist that while the concept of "necessity" does not mean absolute necessity, it should not be "extended too far" and should be kept "within the limits of equity" if possible.¹²³ He gives a few examples, including seizures of land for military purposes and confiscation of private stores for distribution in times of famine.¹²⁴ As for compensation, Pufendorf explains that it is rooted in the principle of equal treatment.¹²⁵ Natural equity requires that each citizen should bear only a just share of the burdens of government; therefore, anyone compelled to contribute more should be reimbursed.¹²⁶

2. Locke

Grotius and Pufendorf had sought to explain and justify private property as an institution based on and limited by social convention and social needs. Under their contractarian approach, property rights are not absolute and not natural in the strong sense of being compelled by natural law, but rather in the weaker sense of being consistent with rational human nature under conditions of scarcity.¹²⁷ Moreover, it was very much open to doubt whether such a contract as they posited really existed. As Sir Robert Filmer sarcastically observed, "Certainly it was a rare felicity, that all the men in the world at one instant of time should agree together in one mind to change the natural community of all things into private dominion."¹²⁸ An express contract seems historically implausi-

121. *Id.* at 1277.

122. *Id.*

123. *Id.* at 1286.

124. *Id.* at 1285.

125. *Id.*

126. *Id.*

127. SCHLATTER, *supra* note 25, at 131.

128. ROBERT FILMER, *PATRIARCHA AND OTHER POLITICAL WORKS* 273 (Peter Laslett ed., 1949) (1680).

ble, and it is perhaps a stretch to qualify acquiescence in the seizure of land by others as an implied contract. Further, even if the historical existence of such a contract could be demonstrated, it is difficult to explain why it should continue to be binding on the current generation, which manifestly did not enter into it.

Locke sought to solve all of these difficulties and place the right to property on a much firmer foundation than his predecessors, a foundation that was prior to and independent of any social contract. His plan was to show "how Men might come to have a *property* in several parts of that which God gave to Mankind in common, and that without any express Compact of all the Commoners."¹²⁹ Beginning with the premise that "every Man has a *Property* in his own *Person*,"¹³⁰ Locke concludes that man therefore has a property right to his labor and its fruits. "For this *Labour* being the unquestionable *Property* of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others."¹³¹ Moreover, Locke extends this reasoning to explain appropriation not just of "the Fruits of the Earth, and the Beasts that subsist on it, but the *Earth itself*," which is the "*chief matter of Property*"¹³²: "*As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property.*"¹³³

Locke's justification of property rights is central to his entire political theory. In his view, the right to property is not just one right among many, but the paradigm right and a metaphor for rights in general. In the passages from his chapter "Of Property" in the *Second Treatise*, quoted above, Locke uses the term primarily in the conventional sense to refer to ownership rights over things, but he also uses it elsewhere in a broader sense to refer to all rights to "Life, Liberty, and Estate."¹³⁴ For Locke, the preservation of property in this broad sense is the essential function of the state: "The great and *chief end*, therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property.*"¹³⁵

129. LOCKE, *supra* note 9, at 304.

130. *Id.* at 305.

131. *Id.* at 306.

132. *Id.* at 308.

133. *Id.*

134. *Id.* at 341. In his footnote to this passage, Laslett collects many other instances where Locke uses the term "property" in this broad sense.

135. *Id.* at 368-69.

Thus, Locke attempted to ground the right to property in labor in order to demonstrate that it was prior to, and thus, superior to the claims of the state itself. As has often been observed, this doctrine was well suited to buttress the claims of the rising bourgeoisie, whose wealth, in large part, was based on productive activity. In his *First Treatise of Government*, Locke argued against both the absolutist pretensions of monarchs based on divine right and the aristocratic claims of the nobility to special privileges based on inherited status.¹³⁶ Locke's *Two Treatises*, which appeared in 1690, articulated the ideological assumptions that had triumphed with the Glorious Revolution of 1688. His theory owed its enormous success more to its consistency with the spirit of the times than to its intrinsic rigor and internal consistency. As Bertrand Russell observed, Locke was the "most fortunate of philosophers," if by no means the most profound, original, or systematic.¹³⁷ Serendipitously, he articulated his political theory at the precise time and place where it perfectly embodied the prevailing wisdom. His liberal ideas were "so completely in harmony with prevailing opinion in late 17th century England that it is difficult to trace their influence, except in theoretical philosophy."¹³⁸ But they had a profound and revolutionary impact on practical political developments in France and America more than a century later.

Upon closer examination, the labor theory of property, which is the foundation of Locke's political theory, presents intractable problems. It seems somewhat odd, for example, that Locke speaks of man as having "property" in his person. As Peter Laslett has pointed out, this language "almost contradicts his first principle that men belong to God, not themselves."¹³⁹ And even if we accept that man is entitled to the fruits of his labor, it is by no means self-evident that merely by tilling and sowing a field he gains title not only to the current crop but to the field itself.¹⁴⁰ Most problematically, Locke's labor theory had potentially revolutionary implications not just for the feudal order, but for the emerging capitalist system that was taking its place. For if labor is the natural foundation of the right of property, then the legitimacy of forms of prop-

136. See generally *id.* at 159-281.

137. BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 600, 605 (1945); cf. *id.* at 624.

138. *Id.* at 600-01.

139. LOCKE, *supra* note 9, at 100.

140. See generally *id.* at 303-09.

erty that are not directly the result of labor, such as inheritance, rent, interest, profit, and so forth, are called into question. And such forms of property are as common under capitalism as under feudalism.

However, Locke himself shrank from drawing such revolutionary conclusions. Although he argued that labor is the natural basis of the right to property, he did not contend that those forms of property not based in one's own labor are illegitimate. He makes clear that the right to property is based on labor only in the state of nature.¹⁴¹ However, to explain property rights in civil society, he is forced to fall back on the same social contract analysis as Grotius and Pufendorf. "[T]he several *Communities* settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, by *Compact* and Agreement, settled the *Property* which Labour and Industry began."¹⁴²

Thus, in his justification of the right to property as an institution of civil society, Locke blithely retreats from his first principle that every man owns his person, his labor, and its fruits. He takes it as self-evident that a master owns the fruit of his servant's labor just as clearly as he owns the labor of his draft animals: "Thus the Grass my Horse has bit; the Turfs my Servant has cut; and the Ore I have digg'd in any place . . . become my Property, without the assignation or consent of any body."¹⁴³ Moreover, in his discussions of slavery, Locke involves himself in even greater contortions. For although he opens the *Two Treatises* with a ringing condemnation of slavery as "directly opposite to the generous Temper and Courage of our Nation,"¹⁴⁴ he ends up justifying "the perfect condition of *Slavery*, which is nothing else, but the *State of War continued, between a lawful Conquerour, and a Captive*."¹⁴⁵ However repugnant he may have found the notion of enslaving Englishmen, Locke cheerfully defends the enslavement of Africans, in which he participated extensively both as an investor and as a colonial administrator.¹⁴⁶ In fact, he took special care to justify and protect slaveholding interests in both the Fundamental Constitutions of

141. See *id.* at 317.

142. *Id.*

143. *Id.* at 307.

144. *Id.* at 159.

145. *Id.* at 302.

146. *Id.* at 303 n.24.

1669 (which he drafted for Carolina) and the Instructions of 1698 for Governor Nicholson of Virginia.¹⁴⁷ One can only conclude, as Peter Laslett has said, that Locke was "satisfied that the forays of the Royal Africa Company were just wars."¹⁴⁸ A captive in such a war, Locke insists, has "by his fault, forfeited his Life;" therefore, he can complain of "no injury."¹⁴⁹ In the "perfect condition" in which they find themselves, slaves are merely the object and not the subject of rights: "not capable of any Property, [they] cannot in that state be considered as any part of *Civil Society*; the chief end whereof is the preservation of Property."¹⁵⁰

Thus, on close examination, Locke's theory of property is fraught with unresolved tensions between natural and conventional right. His goal was to establish the right to property (understood both in the narrow sense as "estate" and in the broad sense as rights in general) as natural and pre-political rather than conventional and thus superior to the claims of the state. However, he succeeded only in showing how a right to private property based on labor might hypothetically have emerged in the state of nature. As for actually existing property rights in civil society, he clearly believed they remain fundamental and inviolable, even though they are no longer purely natural but conventional. Property is sacrosanct even when no longer based on the labor of the proprietor, and even (in the case of property in slaves) when based on the negation of his first principle that every man owns his own person, his labor, and its fruits. Though he conceded that property rights are now the creation of positive convention rather than natural law, he insisted, somewhat paradoxically, that they remain immune from positive interference by the law: "The *Supream Power cannot take* from any Man any part of his *Property* without his own consent."¹⁵¹

Blackstone's account of the origin of private property essentially reiterates Locke's analysis in simplified and exaggerated form.¹⁵² In tones more hyperbolic than even the Romanist authorities, Blackstone defined property as "that sole and despotic dominion which one man claims and exercises over the external

147. *Id.*

148. *Id.*

149. *Id.* at 302.

150. *Id.* at 341.

151. *Id.* at 378.

152. 2 WILLIAM BLACKSTONE, COMMENTARIES *2-*9.

things of the world, in total exclusion of the rights of any other individual in the universe.”¹⁵³ In his discussion of eminent domain, his rhetoric of absolute rights is, if anything, even more extreme than Locke’s:

So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.¹⁵⁴

As Blackstone well knew, this was an overstatement. Parliament did in fact frequently force owners to part with their property without their consent. Blackstone was able to reconcile his absolutist rhetoric with the actual reality of expropriation only through the oxymoronic notion of compelled consent, conceding that “[i]n this and similar cases, the legislature frequently does interpose, and compel the individual to acquiesce” to a proffered indemnification.¹⁵⁵

3. Rousseau

Rousseau sharply criticized the conceptions of “natural law” advanced by theorists from ancient to modern times. As we have seen, the natural law tradition commonly conflated several very different ideas of the “state of nature.” The state of nature is sometimes conceived as an actual early historical stage of human development, sometimes as the state in which nations currently exist with respect to one another, sometimes as a purely hypothetical state. Corresponding to these ideas are differing conceptions of natural law as the primordial law governing human society, the law of nations, and the law of reason respectively. In Rousseau’s view, only the last of these conceptions has any validity.

It is futile, Rousseau argued, to attempt to establish a philosophy of right on a state of nature, which is at best hypothetical, “a state which no longer exists, perhaps never existed, which probably never will exist.”¹⁵⁶ Natural law, conceived of as the law of

153. *Id.* at *2.

154. 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

155. *Id.*

156. JEAN-JACQUES ROUSSEAU, THE FIRST AND SECOND DISCOURSES 93 (Roger D. & Judith R. Masters trans., 1964) (1750 & 1754) [hereinafter ROUSSEAU, DISCOURSES].

reason, is neither eternal nor unchangeable, much less prior to civil society: it is unveiled only gradually, as civilized experience gradually refines human conceptions of justice.¹⁵⁷ One cannot deduce a theory a natural law from the primeval condition of man, nor from human history, nor from the law of nations. Aristotle, for example, declared "that men are not naturally equal, but that some are born for slavery and others for dominion."¹⁵⁸ However, he "mistook the effect for the cause."¹⁵⁹ If they appear to be "slaves by nature, the reason is that men were made slaves against nature."¹⁶⁰ Similarly, Grotius' "constant manner of reasoning is to establish right by fact. A more satisfactory mode might be employed, but none more favourable to tyrants."¹⁶¹ In response to Aristotle, Aquinas, Grotius, Pufendorf, and Locke, all of whom defended the "right" of slavery, Rousseau responds that "the right of slavery is . . . null, not only because it is unjustifiable but because it is absurd and has no meaning. The terms 'slavery' and 'right' contradict and exclude each other."¹⁶²

Rousseau's attitudes toward private property underwent dramatic changes over the course of only a few years. In the *Second Discourse* (the *Discourse on the Origin of Inequality* of 1755), he condemned private property as the result of usurpation:

The first person who, having fenced off a plot of ground, took it into his head to say this is mine and found people simple enough to believe him, was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared by someone who, uprooting the stakes or filling in the ditch, had shouted to his fellow-men: Beware of listening to this impostor; you are all lost if you forget that the fruits belong to all and the earth to no one!¹⁶³

Although Rousseau accepted the general framework of classical primitivism, which regarded the state of nature as a golden age of innocence and the invention of private property as the fruit of avarice, Rousseau agreed with Locke in identifying labor as the origin of the right to property:

157. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 18-19 (Charles Frankel ed. 1947) (1762) [hereinafter ROUSSEAU, SOCIAL CONTRACT].

158. *Id.* at 7.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 13.

163. ROUSSEAU, DISCOURSES, *supra* note 156, at 141-42.

It is labor alone which, giving the cultivator a right to the product of the land he has tilled, gives him the right to the soil as a consequence, at least until the harvest, and thus from year to year; which, creating continuous possession, is easily transformed into property.¹⁶⁴

However, he parted company with Locke in insisting that this right is "different from the one which results from natural law."¹⁶⁵ From the introduction of private property flow a host of vices: ostentation, deceit, jealousy.¹⁶⁶ As differences of wealth increase, social conflicts intensify, until finally people resort to the creation of the civil state, which "destroyed natural freedom for all time, established forever the law of property and inequality," and thus, "changed a clever usurpation into an irrevocable right."¹⁶⁷ The birth of civil society for Rousseau is thus marked not (as it is for Locke) by the preservation and extension of natural rights, but rather (as for Hobbes) by their extinction.

In his subsequent writings, however, Rousseau took a far more sanguine view of both property and civil society. The change is evident in his *Discourse on Political Economy*, written a mere six months after the *Second Discourse*. In *Political Economy* he declared, "[T]he right of property is the most sacred of all the rights of the citizens, and more important, in certain respects, than freedom itself."¹⁶⁸ The expense of maintaining the state must be met without attacking this sacred right.¹⁶⁹ Finally, in 1762, Rousseau set out his theory of property in its most fully-developed form in *The Social Contract*. The "right" of occupancy in the state of nature is in fact merely a possessory interest, and not a true property right; in contrast, the right of property in civil society is a conventional right, but is, nevertheless, infinitely more secure than the

164. *Id.* at 154.

165. *Id.*

166. *Id.* at 157-58.

167. *Id.* at 160.

168. JEAN-JACQUES ROUSSEAU, DISCOURS SUR L'ÉCONOMIE POLITIQUE (1755), in 3 JEAN-JACQUES ROUSSEAU, ŒUVRES COMPLÈTES 239, 263 (Bernard Gagnebin & Marcel Raymond eds., 1964) [hereinafter ROUSSEAU, L'ÉCONOMIE POLITIQUE].

169. *Id.* at 264. Rousseau suggests that the state should be maintained through the revenues from public land (*domaine public*), and through taxation, imposed by consent of the people and its representatives, and ought to apportioned progressively. Only "superfluous" property should be taxed; those who possess only the minimum necessary for subsistence ought to pay nothing, both on humanitarian grounds and because they benefit less from general protection of property than the wealthy. *Id.* at 264-73.

natural possessory interest.¹⁷⁰ This true right to property emerges only when individuals uniting to form civil society surrender their possessory interests to the state, which guarantees them not as a matter of private right but of public advantage.¹⁷¹

For Rousseau, therefore, property is a conventional civil right and not a natural right. Private property rights are subordinate to the public interest, but Rousseau insists that it will never be in the public interest to violate them. The "paradox" of property as a conventional right "is that, in accepting the property of individuals, the community is far from despoiling them, and only ensures them justifiable possession, changes usurpation into a true right, and enjoyment into property."¹⁷² Thus, upon entering civil society, individuals "may be justly said to have acquired all that they gave up."¹⁷³ As a conventional creation, "the right which each individual has over his own property is always subordinate to the right which the community has over all."¹⁷⁴ Furthermore, "the Sovereign is the only judge of what is important to the community."¹⁷⁵ Nevertheless, "the Sovereign cannot, on its side, impose any burden on the subject useless to the community; it cannot even have the inclination to do so."¹⁷⁶

In his constitutional proposals for Corsica and Poland, Rousseau provided a sketch of how his ideas might be implemented in practice.¹⁷⁷ In the *Constitutional Proposal for Corsica*, he undertook to design a political and legal system for a society that was starting from scratch, which "had never yet borne the true yoke of the law."¹⁷⁸ Rousseau was therefore able to give his radical ideas about property free rein. He suggested that the state ought to be the largest landowner and ought to distribute property to its citizens in accordance with their services: "Far from wishing the state to be poor I would like instead for it to own everything and for

170. ROUSSEAU, SOCIAL CONTRACT, *supra* note 157, at 19-22.

171. *Id.*

172. *Id.* at 21.

173. *Id.*

174. *Id.* at 21-22.

175. *Id.* at 28.

176. *Id.*

177. See generally JEAN-JACQUES ROUSSEAU, PROJET DE CONSTITUTION POUR LA CORSE (1772), in 3 JEAN-JACQUES ROUSSEAU, OEUVRÉS COMPLÈTES 528, 530-31 (1964) [hereinafter ROUSSEAU, PROJET DE CONSTITUTION].

178. Letter from Matteo Buttafuoco to Jean-Jacques Rousseau (Aug. 31, 1764), in 2 THE POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU 296, 366 (C.E. Vaughn ed., 1915) [hereinafter ROUSSEAU, POLITICAL WRITINGS].

each to share in the common property only in proportion to his services.”¹⁷⁹ His aim, like Plato’s in *The Laws*, was “not to destroy private property completely, because that is impossible, but to circumscribe it within the narrowest limits” and, thus, “to keep it always subject to the public good.”¹⁸⁰ In short, he wished that “the property of the state be as great and strong and that of the citizens be as small and weak as possible.”¹⁸¹

In *Considerations on the Government of Poland*, however, Rousseau appears far more restrained. He dealt here not with a small island or a *tabula rasa*, but with an enormous country which had a long political tradition, entrenched institutions, and, moreover, powerful neighbors who threatened it with extinction. Therefore, his first concern was for the preservation of the freedom and independence of the country, and his suggestions for the reform of property rights were quite moderate. He did propose that the nobility’s fiscal exemptions be abolished and replaced with a proportional land tax.¹⁸² Yet despite his fierce attacks elsewhere on exploitation and slavery, Rousseau did not advocate immediate emancipation of the serfs: “Liberty is a strong food, but it needs a stout digestion.”¹⁸³ Therefore, Rousseau argued that only gradual emancipation could succeed in Poland.¹⁸⁴

III. THE CONSTITUTIONALIZATION OF THE RIGHT OF PROPERTY

With the emergence of the first modern written constitutions in the late eighteenth century, the right to property was enshrined as a fundamental constitutional right. Although Locke’s influence was certainly critical, it would be incorrect to assume, as some have, that the framers of the first declarations of rights simply constitutionalized Lockean principles. Although the framers generally agreed on the importance of the right to private property, they did

179. ROUSSEAU, *PROJET DE CONSTITUTION*, *supra* note 177, at 931.

180. *Id.*

181. *Id.* Rousseau recognized the practical obstacles to accomplishing this goal: There was no large stock of cultivated public land present in Corsica. But he suggested uncultivated land could be reclaimed for the state by leasing or *corvées*, and that public revenue could be augmented by taxation. *See id.*

182. *See generally* JEAN-JACQUES ROUSSEAU, *CONSIDÉRATIONS SUR LE GOUVERNEMENT DE POLOGNE ET SUR SA RÉFORMATION PROJETTEE*, in 3 JEAN-JACQUES ROUSSEAU, *OEUVRES COMPLÈTES* 951, 1011-12 (1964) [hereinafter ROUSSEAU, *CONSIDÉRATIONS*].

183. ROUSSEAU, *POLITICAL WRITINGS*, *supra* note 178, at 382.

184. ROUSSEAU, *CONSIDÉRATIONS*, *supra* note 182, at 1011-12, 1026-29.

not agree on the essential nature of this right. Is it natural, pre-political, and essentially inalterable, or is it conventional and thus subject to redefinition? Is it exclusively a negative individual right, or does it entail social responsibilities?

Given the diversity of public opinion concerning these questions, as well as the gaps in the historical record, it would be folly to attempt to recover a single "original understanding" of the constitutional right to property. Attempts to elaborate a consistent originalist constitutional jurisprudence in the United States have been markedly unsuccessful.¹⁸⁵ The failure of originalism as a theory of constitutional interpretation is nowhere more glaring than in the field of constitutional property law, where the self-professed "originalists" on the Supreme Court are perhaps the most cavalier of all the Justices in their disregard for the original understanding. In France, originalism has never gained much traction as a method of constitutional interpretation, and leading constitutional historians have recognized the futility of seeking to recover a single "original meaning." As Stéphane Rials has written, "How can we say that the Declaration is clearly this or that, when its provisions were most often the result of ambiguous agreements among men who . . . each entertained rather different opinions . . . ?"¹⁸⁶ Because of the insuperable difficulties involved in recovering individual understandings, aggregating them, and formulating the result at an appropriate level of generality, Rials suggests, "[e]very project that would venture to supply [the Declaration with] a final and unequivocal meaning is undermined from the start."¹⁸⁷

185. See, e.g., Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); Henry P. Monaghan, *Stare Decisis and Constitutional Interpretation*, 88 COLUM. L. REV. 723 (1988); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

186. RIALS, *supra* note 5, at 154.

187. *Id.* at 334. Rials suggests that it is futile not only to attempt to recover a single original understanding of a constitutional text, but even to recover a single animating philosophy underlying it:

Here are Tablets of the Law that are the result of cutting and pasting and patching, the fruit of negotiations, transactions, and agreements whose subjective meaning varied from one representative to another. . . Can we say that the Declaration provides us with a common formulation of the spirit of certain elites of the time? Certainly, if such a statement has any meaning. But even granting this, far from concluding that the philosophy of the Declaration is accessible, we must rather be inclined to doubt that it could have had a philosophy, even if it cannot be ruled out on the other hand that common understandings were imbued to a

Nevertheless, although the search for a single original meaning of the constitutional right to property would be fruitless both as a practical and as a theoretical matter, it is nonetheless enlightening to explore the views of leading participants in the great transatlantic eighteenth-century debate in all their diversity, ambiguity, and self-contradiction. An examination of the debates over the constitutional right to property in the United States and France may lead to a greater appreciation of the common and distinctive features of each national tradition. Both the American and French revolutionaries regarded the right to property as fundamental to republican institutions.¹⁸⁸ But the formulation of that right was rather more practical and concrete in the U.S. Bill of Rights, and more abstract and aspirational in the French Declaration. In the United States, there was perhaps a wider consensus regarding the nature of the right to property, which ultimately contributed to the emergence of a relatively stable constitutional order, while in France, more divergent views emerged, which reflected the greater social polarization of French society, and which contained the seeds of a continuing process of revolutionary development that persisted long into the next century. A central (if often unexpressed) concern in the American debate was the issue of slavery; in France, the issue of representation proved much more important and contentious.

A. America

For the past half-century, historians and legal scholars have presented the founding of the United States in terms of two opposing ideological traditions: Lockean liberalism and civic republicanism.¹⁸⁹ Writing in 1955, Louis Hartz viewed the entire history of the United States as characterized by a unique embrace of the Lockean values (even though they were rarely explicitly recognized as such) of political pluralism and individualism.¹⁹⁰ As elaborated by economic libertarians such as Richard Epstein, the fundamental Lockean principle of the inviolability of property

greater extent by certain currents of thought than by others.

Id. at 335.

188. RIALS, *supra* note 5, at 157, 250.

189. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 50-64 (2d ed. 1991).

190. *Id.* at 128-29; see also GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 128-29 (1997).

prohibits any redistributive activity by the state and almost any regulation that affects property values without compensation: "All regulations, *all* taxes, and *all* modifications of liability rules are takings of private property *prima facie* compensable by the state."¹⁹¹ This approach "yields a Takings Clause of cosmic proportions,"¹⁹² which, as Epstein cheerfully admits, would invalidate "much of the twentieth-century legislation."¹⁹³

Since the 1960s, however, a historiographical reappraisal has occurred that sharply questions Hartz's exclusive focus on Lockean liberalism. The seminal studies of Bernard Bailyn, Gordon Wood, and J.A.G. Pocock have emphasized very different ideological currents in American revolutionary thought which may be grouped broadly under the rubric of "civic republicanism."¹⁹⁴ Whereas Lockean liberalism exalted individualism and pluralism, the civic republican tradition celebrated virtue, which is defined as the willingness to sacrifice one's selfish private interests for the greater public good. Civic republicans tended to regard property as a social right, which they treated as the foundation of civic status rather than as a mere commodity. Later, as egalitarian ideals began to supplant hierarchical ones, republicans stressed the potential for regulation and redefinition of property relations to promote wider political participation.

Gregory Alexander has forcefully argued that the dialectical relationship between these two conceptions of property, which he terms "commodity" and "propriety," has been central to American legal history from its founding to the present time.¹⁹⁵ As he points out, these opposing conceptions rarely existed in a pure form, but were often both embraced by the same person to differing extents: "Few, if any, American legal writers were consistently and exclu-

191. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 95 (1985).

192. DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 50 (2002).

193. EPSTEIN, *supra* note 191, at 281.

194. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); J.A.G. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION*, at vii-x, 409 (1975). For an overview of work of these historians and their influence on contemporary legal scholarship, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 143-63 (1996).

195. ALEXANDER, *supra* note 190, at 1 (citing CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* (1994)).

sively committed to one or the other.”¹⁹⁶ None of the Framers explicitly identified themselves solely with liberalism or with civic republicanism. Nevertheless, their statements on the subject of property tend to place Hamilton and Madison in the former camp, and Franklin and Jefferson (at least in his early years) in the latter camp. The tension between nature and convention was central to the Framers’ discourse on the constitutional right to property.

1. Jefferson and the Civic Republican Tradition

The civic republican view that property is created by society and may be regulated in the public interest reflected both actual practice and political theory during the colonial and revolutionary periods. Governmental regulation of property was pervasive during this time,¹⁹⁷ and the ideology of civic republicanism, especially in conjunction with emerging democratic ideals, reinforced the view that the state enjoys broad power to regulate and reorder property relations. Scholars such as William Treanor have emphasized just how pervasive these ideas were during the colonial and revolutionary periods.¹⁹⁸ For example, Benjamin Franklin wrote that “Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing.”¹⁹⁹ Thomas Paine expressed a Rousseauian faith stating that a government where the people are truly sovereign could never violate basic rights, including the right to property: “All property is safe under their protection.”²⁰⁰

Jefferson’s views on property rights were complex and not entirely consistent.²⁰¹ Over the course of his life, he appeared to vacil-

196. *Id.* at 3; cf. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 823 (1995) [hereinafter Treanor, *Original Understanding*] (observing that “much recent historical work has contended that, at the time of the framing, relatively few, if any, politicians of note were purely liberal or purely republican.”).

197. See generally William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1070-95 (1994).

198. Treanor, *Original Understanding*, *supra* note 196, at 792-93; William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695, 698 (1985) [hereinafter Treanor, *Fifth Amendment*].

199. Treanor, *Fifth Amendment*, *supra* note 198, at 700 (quoting BENJAMIN FRANKLIN, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, in 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (A. Smythe ed., 1907)).

200. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 62 (1969).

201. See generally Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976).

late between rejecting and accepting Locke's theory of a natural right to property. His statements during the revolutionary period and during his time in France suggest that he viewed property as a creation of positive law only, which may be subjected to limitations in the interest of society. Jefferson's well-known decision to draft the Declaration of Independence to substitute "the pursuit of happiness" for "property" in the Lockean triad of "life, liberty, and property" has been taken to indicate that "he did not consider property an inalienable right."²⁰² Similarly, in reviewing Lafayette's proposed draft of the French Declaration of the Rights of Man, Jefferson placed the word *propriété* in brackets, seemingly indicating disapproval of the notion that property is a natural right.²⁰³

Writing from Fontainebleau to Madison in 1785, Jefferson deplored the "unequal division of property" in France and suggested that the right to labor, rather than the right to property, is fundamental:

I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. . . . Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on. If, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be furnished to those excluded from the appropriation. If we do not the fundamental right to labour the earth returns to the unemployed.²⁰⁴

In a famous letter sent from Paris to Madison in 1789, Jefferson stressed the social character of the right to property and suggested that the use of common-law devices such as entailments and encumbrances to control property after the death of the proprietor were void as contrary to natural law:

202. Treanor, *Fifth Amendment*, *supra* note 198, at 700.

203. *Lafayette's Draft of a Declaration of Rights*, in 15 THE PAPERS OF THOMAS JEFFERSON, MAR. 27, 1789-NOV. 30, 1789, at 230, 233 (Julian P. Boyd ed., 1958); cf. SCHLATTER, *supra* note 25, at 196.

204. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON, FEB. 25-OCT. 31, 1785, at 682 (Julian P. Boyd ed., 1953) [hereinafter Letter to James Madison 1785].

I set out on this ground, which I suppose to be self-evident, '*that the earth belongs in usufruct to the living*': that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society. . . . [T]he child, the legatee, or creditor takes it, not by any natural right, but by a law of the society of which they are members, and to which they are subject. Then no man can, by *natural right*, oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment of debts contracted by him.²⁰⁵

As Alexander has pointed out, Jefferson emphatically rejected the Lockean notion that property rights are rooted in nature. Rather, in Jefferson's view, property rights are conventional and contingent in the sense that "society creates property rights and ought continually to control them."²⁰⁶

Nevertheless, Jefferson did not press these radical arguments to their ultimate conclusion. He did not advocate direct redistributive government action, much less attack the institution of private property itself. Rather, he advocated policies that would ensure the widest possible distribution of property without disturbing existing property rights. These "means of silently lessening the inequality of property" might include the abolition of entail and primogeniture and even, as he suggested in 1785, progressive taxation.²⁰⁷ As a member of the Virginia legislature, he had successfully sponsored the former reforms (although not the latter). Many decades later, in writing his autobiography, he continued to express great pride in these acts, which he regarded ". . . as forming a system by which every fibre would be eradicated of antient or future aristocracy; and a foundation laid for a government truly republican."²⁰⁸

205. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, MAR. 27-NOV. 30, 1789, at 392, 393 [hereinafter Letter to James Madison 1789].

206. ALEXANDER, *supra* note 190, at 27.

207. Letter to James Madison 1785, *supra* note 204, at 682. A few years later Madison was to echo Jefferson's enthusiasm for "silent" devices to equalize the distribution of property without directly infringing existing rights (although Madison never went so far as to favor progressive taxation). See JAMES MADISON, *Parties*, NATIONAL GAZETTE, Jan. 23, 1792, in 14 THE PAPERS OF JAMES MADISON 197 (William T. Hutchinson et al. eds., 1962-1991).

208. THOMAS JEFFERSON, AUTOBIOGRAPHY, reprinted in THOMAS JEFFERSON: WRITINGS 44 (Merrill D. Peterson ed., 1984).

Yet, despite these statements made in the 1770s and 1780s, which apparently treated property as a conventional right, as time passed Jefferson began to show greater sympathy for Locke's views. As early as 1790, he praised Locke's "little book on government" as being "perfect as far as it goes."²⁰⁹ As Secretary of State under President George Washington, Jefferson kept Locke's portrait alongside those of Newton and Bacon in his lodgings in Philadelphia, and told his dinner guests that they were "my trinity of the three greatest men the world had ever produced."²¹⁰

However, as late as 1813, Jefferson appeared to reassert the notion that the right to property is a purely conventional, as opposed to a natural, right:

[I]t is a moot question whether the origin of any kind of property is derived from nature at all . . . It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it; but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society.²¹¹

Yet three years later, the Sage of Monticello seemed to repudiate these views. In 1816, in an introduction to the Lockean *Treatise on Political Economy* by the French economist Antoine Destutt de Tracy, Jefferson attacked the idea of progressive taxation, which he had so clearly endorsed in 1785, and vigorously defended the right of inheritance, which he had previously sharply questioned.²¹² Later that year he came close to embracing the Lockean position that the right to property is natural rather than conventional, declaring that "a right to property is founded in our natural wants, in the means with which we are endowed to satisfy these

209. Letter from Thomas Jefferson to Thomas Mann Randolph (May 30, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 448, NOV. 30, 1789-JULY 4, 1790, at 449 (Julian P. Boyd ed., 1961).

210. Letter from Thomas Jefferson to Benjamin Rush (Jan. 16, 1811) in THOMAS JEFFERSON: WRITINGS, *supra* note 208, at 1234, 1236. Hamilton, who was present at that occasion, dourly replied: "Julius Caesar was the greatest man who ever lived."

211. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THOMAS JEFFERSON: WRITINGS, *supra* note 208, at 1286, 1291.

212. See SCHLATTER, *supra* note 25, at 197.

wants, and the right to what we acquire by those means without violating the similar rights of other sensible beings.”²¹³

It is difficult to reconcile the inconsistent positions that Jefferson took on the subject of the right to property over the course of his lifetime. As a revolutionary he tended to reject the Lockean notion that the right to property is natural, pre-political and fundamental. However, if he regarded property as a social right potentially subject to redistributive measures, he preferred that any such measures be implemented gradually and indirectly, without attacking existing holdings. His final words on the subject seem decidedly at odds with his early views, perhaps reflecting a retreat from radical egalitarianism.

2. Madison and Property as a Fundamental Right

Unlike Jefferson, Madison was unambiguous in his support for the idea that the right to property is fundamental and must be immune from political interference. Indeed, as Jennifer Nedelsky has cogently argued, the problem of protecting the right to property within the framework of a representative government was perhaps Madison’s central obsession.²¹⁴ Although in Madison’s day property was relatively widely distributed in the United States, he was nevertheless convinced that over the course of time, economic development would result in ever greater concentration of wealth in the hands of a small minority, as in Europe, leaving the vast majority without any property at all.²¹⁵ Under such circumstances, the propertyless majority, unless properly restrained, would be tempted to violate the property rights of the wealthy minority. As early as 1785 he wrote that the question of devising a system of representation that would adequately protect property rights was:

[A] matter of great delicacy and critical Importance. To restrain it to the landholders will in time exclude too great a proportion of citizens; to extend it to all citizens without regard to property, or even to all who possess a pittance may throw too much power into hands which will either abuse it themselves or sell it

213. Letter from Thomas Jefferson to P.S. Dupont de Nemours (Apr. 24, 1816), in THOMAS JEFFERSON: WRITINGS, *supra* note 208, at 1384, 1387.

214. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 16-66 (1990).

215. *Id.* at 18.

to the rich who will abuse it."²¹⁶

In a speech in the Federal Convention in August 1787, Madison elaborated on these views:

Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty. In future times a great majority of the People will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation: in which case, the rights of property & the public liberty, will not be secure in their hands: or which is more probable, they will become the tools of opulence & ambition, in which case there will be equal danger on another side.²¹⁷

In *Federalist 10*, his famous exposition of his doctrine of faction, he explained that "[T]he most common and most durable source of faction, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society."²¹⁸ For Madison, this inequality and resultant conflict of interests were inevitable. Indeed, the protection of "the diversity in the faculties of men from which the rights of property originate" is "the first object of Government."²¹⁹ Because the causes of faction cannot be removed, Madison felt the only solution was to control its effects, and the principal remedy advocated was a system of republican rather than democratic government. Because he believed that democratic government would inevitably threaten property rights, in Madison's view democracy was the problem rather than the solution.²²⁰

In 1788 Madison wrote that there are "two cardinal objects of Government, the rights of persons and the rights of property."²²¹ Prior to the drafting of the Constitution,

the two classes of rights were so little discriminated that a provision for the rights of persons was supposed to include of itself

216. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 THE PAPERS OF JAMES MADISON, MAR. 10, 1784-MAR. 28, 1786, at 350, 353 (Barbara D. Ripel & Fredrika J. Teute eds., 1973).

217. James Madison, *Suffrage Qualifications for Electing the House of Representatives* (Aug. 7, 1787), in 10 THE PAPERS OF JAMES MADISON, MAY 27, 1787-MAR. 3, 1788, at 138-139 (Robert A. Rutland et al. eds., 1977).

218. THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961).

219. *Id.* at 58.

220. See NEDELSKY, *supra* note 214, at 203-11.

221. JAMES MADISON, *Observations on the "Draught of a Constitution for Virginia"* (Oct. 15, 1788), in 11 THE PAPERS OF JAMES MADISON 285, 287 (1977).

those of property, and it was natural to infer from the tendency of republican laws, that these interests would be more and more identified. Experience and investigation have however produced more correct ideas on this subject. It is now observed that in all populous countries, the smaller part only can be interested in preserving the rights of property.²²²

Democracy, therefore, could only be a recipe for disaster.

The most Lockean of all Madison's writings was his 1792 Essay *Property*.²²³ Here, Madison, like Locke, distinguished between a narrow and a broad sense of the term "property." Echoing the absolutist language of Locke and Blackstone, Madison defined "property" in the narrow sense of rights to physical possessions, such as land or chattels, as "that dominion which one man claims and exercises over the external things of this world, in exclusion of every other individual."²²⁴ But in the broader sense, "property" was a metaphor for rights in general. As Madison wrote, in its "larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to everyone else the like advantage*."²²⁵ Property in this larger sense includes fundamental rights such as the freedom of speech and conscience as well as liberty and personal security. "In a word, as a man is said to have a right to his property, he may equally well be said to have a property in his rights."²²⁶ Like Locke, Madison argued that the main purpose of the state is to protect property, in both the narrow and broad senses of the word: "Government is instituted to protect property of every sort," both in possessions and in rights generally.²²⁷ As examples of unjust government actions that infringe the rights to property in both the narrow and broad senses, Madison cites "arbitrary exemptions, restrictions and monopolies" as well as "unequal," "arbitrary" or "excessive taxes."²²⁸ Just as the government may not take property "directly for public use without indemnification to the owner," Madison argued that it should not "*indirectly* violate their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed

222. *Id.*

223. JAMES MADISON, *Property*, NATIONAL GAZETTE (Mar. 27, 1792), in 14 THE PAPERS OF JAMES MADISON 266 (1983) [hereinafter MADISON, *Property*].

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 267.

remnant of the time which ought to relieve their fatigue and soothe their cares."²²⁹

A subtle distinction may nonetheless be drawn between Locke's and Madison's views on property. For Locke, the right to property was fully rooted in natural law, even if civil society protects it as a social right in ways that seem at tension with, or even flatly contradictory to, its origin as a natural right. At times, Madison appears simply to reflect this approach, invoking, for example, "a principle of natural law, which vests in individuals an exclusive right to the portions of ground with which he has incorporated his labors."²³⁰ More commonly, however, Madison tends to speak of the right to *acquire* property (rather than the full right of ownership) as a natural right. For example, in *Federalist 10* he speaks of "the different and unequal faculties of acquiring property."²³¹ Similarly, in his essay *Property*, he stresses the fundamental importance of free exercise of the "means of acquiring property."²³² Later in life, he made the distinction between the natural right of acquisition and the social right to full protection explicit: "The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right."²³³ Thus, it is not clear that Madison adopted Locke's natural right theory *in toto* and without reservation.

Madison's extreme solicitude for the protection of private property reflected his anxiety over various majoritarian threats to the institution: agrarian laws, debtor relief, paper money, and other redistributive schemes. Not the least of his concerns was the potential threat to the institution of slavery. Although Madison, like Jefferson, claimed to favor the ultimate elimination of slavery, he defended the property rights and political power of the slaveholding elite in the name of fundamental justice and human liberty without embarrassment.²³⁴ During the debates over the Virginia constitution in 1829, he proposed that the three-fifths solution adopted as a basis for federal representation be imported into the

229. *Id.* at 267-68.

230. NEDELSKY, *supra* note 214, at 29 (citing Note to Aug. 7, 1787 speech, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 505 (Marvin Meyers ed. 1973)).

231. *THE FEDERALIST* NO. 10, *supra* note 218, at 58.

232. MADISON, *Property*, *supra* note 223, at 268.

233. James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in *JAMES MADISON, WRITINGS* (Jack N. Rakove ed. 1999).

234. *See id.*

state constitution in order to protect the interests of slaveholders: "It is apprehended, if the power of the Commonwealth shall be in the hands of a majority, who shall have no interest in this species of property, that, from the facility with which it may be oppressed by excessive taxation, injustice will be done to its owners."²³⁵ Transported by the prospect of such "oppression" to paroxysms of sanctimony, Madison exclaimed:

It is due to justice; due to humanity; due to truth; to the sympathies of our nature; in fine, to our character as a people, that they [slaves] should be considered, as much as possible [*i.e.*, only for purposes of limiting taxation and enhancing the political power of their owners], in the light of human beings, and not as mere property. As such, they are acted upon by our laws, and have an interest in our laws. They may be considered as making a part, though a degraded part, of the families to which they belong.²³⁶

In this purple peroration, Madison paints the defense of slavery, which was integral to the *jusnaturalist* tradition from Aristotle and Aquinas to Locke, in garish colors of a faux humanitarianism. It reveals the disturbing extent to which the absolutist rhetoric of property as dominion could be deployed to justify the starkest forms of domination.

3. Constitutional Protection of the Right to Property

The extent to which the personal property interests of the Framers influenced the design of the Federal Constitution has been the subject of intense scholarly debate for nearly a century. In 1913, the work of Charles Beard²³⁷ shattered the prevailing consensus of nineteenth-century historiography. This consensus tended to view the Constitution as the well-nigh miraculous handiwork of disinterested statesmen who utterly disregarded their own personal interests in their single-minded focus on the broader public good. Beard argued that the Constitution reflected the general economic interests of the Framers, who were by and large drawn from the wealthiest strata of the population, and concluded that it "was essentially an economic document based on the concept that the fundamental private rights of property are ante-

235. *Id.* at 825.

236. *Id.*

237. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (16th ed. 1959) (1913).

rior to government and morally beyond the reach of popular majorities."²³⁸ Moreover, he concluded that in particular the drafting and ratification of the Constitution represented the triumph of "personalty interests" (i.e. financial, manufacturing, and commercial concerns) over small farmers and debtors.²³⁹ Although Beard's views initially came under sharp attack, his Progressive economic interpretation ultimately became the dominant view in the first half of the twentieth century.

In the 1950s, Beard's thesis came under renewed assault in the works of Robert Brown and Forrest McDonald.²⁴⁰ Brown attacked Beard's views in their entirety, arguing that the Constitution democratically reflected the interests of the entire population.²⁴¹ McDonald, on the other hand, specifically attacked Beard's thesis that the Constitution represented the triumph of a consolidated group of personalty interests.²⁴² In the second half of the twentieth century, the view of Brown and McDonald became the new orthodoxy, and Beard's view was widely treated as discredited.

Neither the twentieth-century proponents nor the opponents of the economic thesis, however, had undertaken a detailed and rigorous statistical analysis of the precise economic interests of the framers and ratifiers and their votes on specific issues. Part of the difficulty consisted in the fact that the Framers could not be neatly classified into dichotomous groups representing personality and realty interests. Most of them had a variety of economic interests that were often in conflict on specific issues. Robert McGuire has recently undertaken a detailed statistical economic analysis that takes into account all the economic interests and measures the partial effects of each interest on the probability of voting in favor of particular positions.²⁴³ McGuire's study confirms Beard's broad proposition that the specific economic interests of the framers and ratifiers clearly influenced their positions, although it does not

238. *Id.* at 324.

239. *See id.* at 324-25.

240. *See generally* ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1956); FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (rev. ed., Transaction Publishers 1992) (1958).

241. BROWN, *supra* note 240, at 199-200.

242. *See* McDONALD, *supra* note 240, at 400.

243. ROBERT A. MCGUIRE, TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION (2003).

confirm his narrow claim that they can be neatly divided into dichotomous groups.

Whatever the personal motivations of the Framers, it is clear that the protection of property was their central concern at Philadelphia. One delegate after another proclaimed its cardinal importance. In the words of Alexander Hamilton, the “[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property.”²⁴⁴ Even more emphatically, Gouverneur Morris observed that “Life & liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of Society.”²⁴⁵ John Rutledge seconded that view: “The gentleman last up had spoken some of his sentiments precisely. Property was certainly the principal object of Society.”²⁴⁶ Pierce Butler stated that the “Government . . . was instituted principally for the protection of property, and was itself to be supported by property.”²⁴⁷ In almost identical terms, Charles Pinckney stated that the government was “instituted for the protection of property.”²⁴⁸ John Dickinson urged that restriction of suffrage to freeholders was “a necessary defense against the dangerous influence of those multitudes without property and without principle with which our Country like all others, will in time abound.”²⁴⁹ From a rather different perspective, John Mercer, who ended up opposing the Constitution and leaving the Convention early, complained: “It is a first principle in political science, that wherever the rights of property are secured, an aristocracy will grow out of it . . . The Governments of America will become aristocracies. They are so already . . . The Legislature must & will be composed of wealth & abilities, and the people will be governed by a Junto.”²⁵⁰

The primary means by which the Convention sought to protect property were structural devices, rather than formal limitations on government powers. By and large, the Framers shared Madison’s lack of confidence in the latter, which he derided as

244. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1911).

245. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 244 (Ohio Univ. Press 1966) (1787).

246. *Id.* at 245.

247. *Id.* at 268.

248. *Id.* at 279.

249. *Id.* at 402.

250. *Id.* at 451.

"parchment barriers."²⁵¹ The few formal limitations that were included were aimed at forestalling the sorts of specific attacks on property rights that were most widespread under the Articles of Confederation, including: issuance of depreciating paper currency²⁵² and debtor relief laws (prohibited by the Contracts Clause).²⁵³ In addition, numerous provisions were inserted to protect the property interests of slaveholders and slave-traders.²⁵⁴ The most important structural protections for property rights were the separation of powers, the system of checks and balances such as the presidential veto and judicial review, bicameralism, large electoral districts, indirect elections of the President and the Senate, and the small size and lengthy staggered terms of the latter. Madison also unsuccessfully advocated further measures for the protection of property, including the limitation of suffrage to freeholders, a council of revision, and a national veto over all state legislation.²⁵⁵

With the decision to draw up a bill of rights, it was decided to supplement these specific formal limitations and general structural protections with general formal limitations on government deprivations of property, which became the Due Process and Takings Clauses of the Fifth Amendment.²⁵⁶ The Due Process Clause had deep roots in the Anglo-American legal tradition, stretching all the way back to the Magna Carta.²⁵⁷ Analogous provisions existed in the colonial charters and the legislation and constitutions of most

251. THE FEDERALIST NO. 48, at 332-33 (James Madison) (Jacob E. Cooke ed., 1961).

252. See U.S. CONST. art. I, § 8, cl. 5; art. I § 10, cl. 1.

253. See *id.* art. I, § 10, cl. 1.

254. See *id.* art. I, § 2, cl. 3 (Three-Fifths Clause); art. I, § 9, cl. 1 (Importation of Persons Clause); art. IV, § 2 (Fugitive Slave Clause). In addition, the Insurrections and Domestic Violence Clauses were widely understood to empower the federal government to suppress slave uprisings. *Id.* art. I, § 8, cl. 15; art. IV, § 4. Furthermore, the restrictions on capitations and the prohibitions on export taxes were intended to prevent Congress from creating tax incentives for emancipation. *Id.* art. I, § 9, cls. 4-5. The Importation and Capitation Clauses were further entrenched by a prohibition on amending them for twenty years. *Id.* art. V. Cf. WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62-63 (1977) (stating that "the Philadelphia Convention inserted no less than ten clauses in the Constitution that directly or indirectly accommodated the peculiar institution.").

255. See NEDELSKY, *supra* note 214, at 52-62.

256. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.").

257. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES & ORIGINS 355 (Neil H. Cogan ed., 1997) (citing the Magna Carta).

of the states,²⁵⁸ and at least four of the state ratifying conventions demanded that such a provision be inserted into the federal Constitution.²⁵⁹

The pedigree of the Takings Clause, on the other hand, is much shorter and more obscure. It had no close general analogue in English or colonial legislation, nor in most revolutionary state constitutions. It may, however, be said to reflect Anglo-American legal practice. The Pennsylvania Constitution and the Virginia Declaration of Rights of 1776 prohibited takings without the owner's consent or the authorization of the legislature, but contained no requirement of just compensation.²⁶⁰ Massachusetts was the only one of the original thirteen states to require compensation (in its constitution of 1780) prior to Congress' adoption of the federal Bill of Rights.²⁶¹ Similar provisions are also found in the 1777 Constitution of Vermont²⁶² (which was admitted as the fourteenth state in 1790) and in the Northwest Ordinance of 1787.²⁶³ As Treanor has argued, the "[a]doption of these clauses evidenced a growing rejection of traditional republican ideology, a decline of faith in legislatures, and a new concern for individual rights—particularly property rights."²⁶⁴ Nevertheless, there was little clamor for the adoption of a federal takings clause or compensation requirement in 1789. None of the state ratifying conventions demanded the adoption of such a provision, as they had done in the case of the Due Process Clause.

Instead, the inclusion of the Takings Clause in the Bill of Rights was apparently largely the work of Madison himself. As originally proposed on June 8 in the House of Representatives, Madison's version provided: "No person shall . . . be obliged to re-

258. *See id.* at 349-56 (collecting analogous provisions from Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont and Virginia).

259. *See id.* at 348-49 (reproducing proposals from the ratifying conventions in New York, North Carolina, Pennsylvania and Virginia).

260. *Id.* at 373-74.

261. *See id.* at 373 ("[W]henver the publick exigencies require, that the property of any individual should be appropriated to publick uses, he shall receive a reasonable compensation therefor.").

262. *See id.* at 374 ("[W]henver any particular Man's Property is taken for the Use of the Public, the Owner ought to receive an Equivalent in Money.").

263. *See id.* ("[S]hould the public exigencies make it Necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same.").

264. Treanor, *Fifth Amendment*, *supra* note 198, at 701.

linquish his property, where it may be necessary for public use, without a just compensation.”²⁶⁵ On July 28, when it was reported out of the committee, it had taken on the form in which it now appears in the Fifth Amendment.²⁶⁶ However, there is no record of the committee’s deliberations, and there was no discussion of the provision before the full House. There is also no record of discussion in the Senate or in the ratifying conventions. Given the almost complete lack of legislative history, it is highly likely, as several scholars have concluded, that “[t]he Takings Clause most likely was perceived as effecting no change in the legal status quo with respect to government takings of property.”²⁶⁷ In particular, it was clearly understood to apply only to physical expropriation, and not to extend to merely regulatory measures.²⁶⁸ Moreover, it is likely that the phrase “for public use” was understood merely as a descriptive reference to eminent domain (thus clarifying that the Clause did not apply, for example to taxation, fines or forfeitures), not as a substantive limitation on the uses to which the government could devote expropriated property.²⁶⁹

Remarkably, the general provisions of the Due Process and Takings Clauses do not specifically guarantee the existence of private property at all. Rather, they merely provide that a state that recognizes the right to property may not deprive an individual of it without due process or compensation. Nor does the Constitution specify the basis of the right to property, much less declare it to be a natural right. If the Framers were in general agreement on the central importance of the property rights, they could not agree on the extent to which such rights were natural and sacrosanct or conventional and subject to political redefinition. Hence, they eschewed such difficult philosophical debates in favor of specific limited practical restraints on the expropriation of existing holdings.

B. France

During the past half-century, the study of the French Revolution has undergone a seismic historiographical shift every bit as

265. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES & ORIGINS, *supra* note 257, at 361.

266. *Id.* at 362.

267. DANA & MERRILL, *supra* note 192, at 14-15 (emphasis omitted).

268. Treanor, *Original Understanding*, *supra* note 196, at 785-97.

269. Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1248 (2002).

profound as that which has shaken study of its American counterpart. Until the second half of the twentieth century, the dominant approach was that especially associated with Marxist historians but shared as well by many others, who saw the revolution primarily in terms of a class struggle in which the rising bourgeoisie seized power from the declining feudal aristocracy.²⁷⁰ More recent, 'revisionist' work both in France and in the English-speaking world has challenged this view, stressing the continuities rather than the discontinuities between the *ancien régime* and the post-revolutionary order.²⁷¹

Although recent scholarship has thus questioned the extent to which the French revolution was truly a social revolution, its social aspects were undeniably more prominent than those of its American counterpart. Feudalism, although moribund, was by no means dead under Louis XVI; but by the end of the revolution, feudalism had been destroyed as a legal institution, and in addition, vast amounts of church property had been transferred to new owners. In America, on the other hand, feudalism hardly existed even in colonial times, and although the revolutionary legislatures abolished slavery in the North, where it was largely marginal to begin with, the peculiar institution survived unscathed in the South, where it was central to the economy. In France, widespread economic disparities and greater social polarization and unrest led to greater political instability than in America, where property was much more evenly distributed. Thus in France often violent political agitation by propertyless groups played a much greater role in shaping the course of events. This led to the emergence of a greater range of views on the right to property, including a significant focus on the rights of the indigent to social assistance. Generally, however, at least among the revolutionary elites, in France as in America the sanctity of the right to property was unquestioned.

270. See, e.g., GEORGES LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION* (1947); ALBERT SOBOUL, *COMPRENDRE LA RÉVOLUTION* 71, 90 (1981).

271. See generally FRANÇOIS FURET, *PENSER LA RÉVOLUTION FRANÇAISE* (1978); ALFRED COBBAN, *THE SOCIAL INTERPRETATION OF THE FRENCH REVOLUTION* (2d ed. 1999).

1. The Declaration of 1789

a. Feudal and Revolutionary Conceptions of Property

The legislative history of the French Declaration of the Rights of Man and the Citizen of 1789, in stark contrast to very thin record of the drafts and debates over the U.S. Bill of Rights, is overwhelming in its variety and complexity. The most comprehensive published collection, edited by Stéphane Rials, contains several dozen draft declarations of rights presented to the National Assembly; but in 1789, there were many more in circulation, whether contained in the lists of grievances (*cahiers de doléances*) prepared in advance of the meeting of the Estates-General, or in manuscripts prepared by delegates or other interested parties.²⁷² The right to property was central to almost all of these projects, but the participants in the debates staked out almost every conceivable position on the subject. The partisans of the old order saw the guarantee of property rights as a bulwark of the old order; revolutionaries saw it as the centerpiece of their attack on feudalism. Many defended the right to property in Lockean terms as a natural right; others insisted it was purely social and conventional. The majority spoke mainly in terms of rights, but a number demanded a declaration of concomitant responsibilities. While most viewed property rights as essential to the creation of a proper constitutional order, some argued that issuing an express guarantee before the constitution had even been established would be foolish and even counterproductive.

One of the first participants to propose a guarantee of property rights was Louis XVI himself. But His Majesty insisted that any guarantee of the right to property must include feudal rights.²⁷³ Belatedly realizing the political explosiveness of his decision to summon the Estates-General, on June 23, 1789, he called a "*séance royale*" in a vain effort to put the genie of the revolution back into the bottle.²⁷⁴ In a trembling voice, he admonished the Third Estate for its "illegal" proceedings, and at the same time attempted to mollify it by presenting a "Declaration of Intentions."²⁷⁵ Article 14 of this declaration provided: "All properties will be constantly re-

272. RIALS, *supra* note 5, at 15-16, 32, 37.

273. *Id.* at 48.

274. *Id.* at 48.

275. *Id.*

spected, and under the term 'properties' His Majesty expressly understands tithes, dues, rents, feudal and seigniorial rights, and in general all useful or honorific rights and prerogatives attached to lands and fiefs or belonging to persons."

The leading lights of the Assembly, although equally attached to the right to property, understood it in quite a different sense. In their view, feudal rights were irrational vestiges of special privilege, and fetters on the right to property properly understood. The philosopher Condorcet, for example, published a draft declaration of rights as early as February 1789, before the Assembly had even been elected. The draft declaration contained seven articles devoted to the security and freedom of property.²⁷⁶ Among these we find the following: "Property may not be subjected under any pretext to any arbitrary or irredeemable obligation [*servitude*]."²⁷⁷ The Marquis de Lafayette drew up no fewer than three such draft declarations, which he shared with both Madison and Jefferson.²⁷⁸ Although much shorter and less theoretical than Condorcet's proposal, they stress the equality of rights and in particular the right to the fruits of one's own industry, thus reflecting a Lockean outlook that is at odds with feudal conceptions of property.

Several of the *cahiers de doléances* went even further, urging the outright abolition of feudal property rights. One of them, for example, immediately after stating that "all property is inviolable," proceeded to declare that "all rights that never could be property rights, because they represent a constant violation of natural right, shall be suppressed, as well as those which, although property rights in principle, have necessarily ceased to be such because the initial cause to which they were linked has ceased to exist."²⁷⁹ The unmistakable reference is to feudal rights that were either based purely on extortion, or on a historical guarantee of military protection that had long since fallen into abeyance.

b. Sieyès: Lockeanism and Social Solidarity

The leading intellect in the drafting of the Declaration was the abbé Sieyès. Although as the Revolution grew increasingly

276. *Id.* at 549.

277. *Id.*

278. *See id.* at 528, 567, 590.

279. PROJET DE DÉCLARATION DE DROITS CONTENU DANS LE CAHIER DE DOLÉANCES DU TIERS ÉTAT DE LA PRÉVÔTÉ ET VICOMTÉ DE PARIS HORS LES MURS (1789), *reprinted in id.* at 564-66.

radical he would later be seen as a moderate, in 1789 he was the leader of the progressive forces in the Assembly.²⁸⁰ Appointed to serve on the committee of eight assigned to prepare an initial draft, he presented his first proposal on June 20 in the form of an extended theoretical discussion followed by a proposed declaration in thirty-two articles.²⁸¹

Sieyès' theoretical discussion clearly reveals his debt to Locke. In a series of logically linked propositions, he derived the right to property from the fundamental right of autonomy basic to any system of individual rights:

The first of rights is the property in one's *person*.

From this primitive right flows the right to one's *actions* and *labor*; for labor is but the useful employment of one's faculties; it is a clear emanation of property in one's person and one's actions.

Property in external objects, or property in things [*la propriété réelle*], is likewise but a consequence and an extension of property in one's person [*la propriété personnelle*]. . . .²⁸²

In the proposed articles that followed, Sieyès developed these Lockean principles, beginning with the affirmation that society is based on a social contract aimed at ensuring the good of its members by protecting their rights to their persons and their labor, and culminating in a series of broad guarantees for the right to property, including free disposition, immunity from abridgement, and equal protection.²⁸³ But with a clear eye to the sale of public office under the *ancien régime*, he also provides that there can be no property right to the exercise of a public function, which can only be considered a duty, not a right.²⁸⁴

However, Sieyès departed from Locke in recognizing a duty on the part of property-owners to provide social assistance to the less fortunate, declaring: "Every citizen who is incapable of providing for his own needs has the right to the assistance of his fellow citizens."²⁸⁵ Antecedents of this principle can be found both in the Christian theologians and in the civilian doctrines of necessity

280. See RIALS, *supra* note 5, at 36-37, 142.

281. *Id.* at 130-32.

282. *Id.* at 596.

283. *Id.* at 603-04 (arts. I, II, VI, VII, IX, XVII).

284. *Id.* at 605 (art. XXX).

285. *Id.* (art. XXV) ("Tout citoyen qui est dans l'impuissance de pourvoir à ses besoins, a droit aux secours de ses concitoyens.").

elaborated by Grotius and Pufendorf. This provision was not adopted in the final version of the 1789 declaration, but that was to have great significance for future developments, both during the later stages of the Revolution, throughout the nineteenth century, and in many modern constitutions throughout the world.

Sieyès' proposal was printed and distributed to all the deputies,²⁸⁶ but it was not adopted by the committee. On July 27, the more moderate Mounier presented to the Assembly two new draft proposals, one on behalf of himself, and the other on behalf of the committee. Both these drafts²⁸⁷ were far less indebted to Locke and laid much less stress on the social contract, the freedom to labor, and the right to property. In his personal draft, Mounier did include property alongside liberty, security, honor, life, freedom of expression, and the right to resist oppression, in a rather lengthy list of imprescriptable rights.²⁸⁸ But apart from this cursory mention, he did not develop the concept of the right to property at any length. He was also notably silent on the right of the indigent to public assistance. The committee's draft was clearly based on Mounier's personal draft (although somewhat longer); it did not elaborate on the right to property any further.²⁸⁹ Champion de Cicé, in a speech explaining the committee's work to the Assembly, was careful to praise both Sieyès' and Mounier's proposals, but intimated that the former was perhaps too difficult for the ordinary person to understand, and left no doubt that his sympathies lay rather with the latter, which was much closer to Lafayette's earlier project.²⁹⁰

At the same time, numerous other proposals were circulating among the Assembly.²⁹¹ Of these, that of Target²⁹² was most notable for its extended treatment of the right to property. Target's proposal owed much to Sieyès and contained a whole series of articles (XV-XIX) devoted to the protection of property rights. Of these, article XVI contains language on expropriation that is quite close to the language of the final version.²⁹³

286. *Id.* at 132.

287. *Id.* at 132-33.

288. *Id.* at 606-07 (art. IV).

289. For a discussion of this proposal, see *id.* at 145-46; for the text, see *id.* at 612-14.

290. *Id.* at 134-35.

291. See *id.* at 136, 576-90.

292. *Id.* at 608-12.

293. *Id.* at 610.

c. Malouet: Attack on the Declaration

In the debate that ensued over these various proposals, none of them seemed likely to garner the support of a majority. On August 1, a number of moderate and conservative deputies took advantage of the opportunity to call into question the entire enterprise of drafting a declaration of rights.²⁹⁴ Malouet, who would emerge as the leader of the so-called *monarchien* faction, did not question the paramount importance of the rights of man as a philosophical matter, and agreed that those rights should form the basis of the new legal order. But he argued that a declaration of those rights should not be inserted into the constitution itself, as had been done in many of the newly-independent American states. For Malouet, the differences between the nature and the distribution of property rights in France and America were crucial:

I realize that the Americans have not taken this precaution; they have taken man from the bosom of nature, and presented him to the universe in his primitive sovereignty. But American society, recently formed, is²⁹⁵ composed entirely of property owners already accustomed to equality, strangers both to luxury and indigence, barely familiar with the yoke of taxation, of the prejudices that dominate us, and encountering no trace of feudalism on the land that they cultivate. Such men were undoubtedly prepared to receive the full impact of freedom: for their tastes, manners and situation summoned them to democracy. But we, Gentlemen, have as fellow-citizens an immense multitude of men without property . . . who are at times irritated, not without just cause, by the spectacle of luxury and opulence. Surely you will not think that I conclude from this that this class of citizens has no equal right to freedom. . . . But I think, Gentlemen, that it is necessary, in a great empire, for men placed by fate in a condition of dependency to see rather the just limits than the extent of natural freedom.²⁹⁶

Thus, Malouet concluded that it would be dangerous and cruel to dangle the rights of property before the eyes of the propertyless masses, without any concrete measures to ensure that they might actually enjoy such rights. Furthermore, in Malouet's view, natural rights, such as the right to property, have real meaning

294. See *id.* at 155-56.

295. The text in Rials' edition erroneously prints "et" [and] here, where the original source has the homophonous word "est" [is]. 8 ARCHIVES PARLEMENTAIRES 322 (1875).

296. RIALS, *supra* note 5, at 157.

only to the extent that they are implemented—and thereby modified and limited—as positive rights. Therefore, he urged the Assembly to climb down from the metaphysical heights of declarations of natural rights and devote itself instead to the practical work of drafting a constitution and laws that would implement those rights meaningfully.²⁹⁷

d. Ladébat: Property as a Social Right

Despite the reservations expressed by Malouet and other moderates, in late July and early August the number of draft proposals before the Assembly continued to multiply. These included a second proposal by Sieyès, as well as more than a dozen others.²⁹⁸ Of all these proposals, perhaps the most interesting from the standpoint of property rights was the proposal that André-Daniel Laffon de Ladébat, a moderate Protestant aristocrat from Bordeaux, introduced on August 13.²⁹⁹ In a series of logically linked articles, Ladébat rejected the notion that the right to property is natural, treating it instead as a purely social right. He declared that society should determine whether property should be held in common or divided into private holdings, and that the former system “can only exist in societies that are not populous,” whereas the latter is “indispensable in populous societies.”³⁰⁰ Although he asserted that private property was a social rather than a natural institution, he nonetheless insisted that it must be considered sacred. Most interestingly, his proposal declared: “The most sacred form of property is that which is acquired by work. Those [forms of property] which are obtained by succession or by gift may be subjected to more detailed regulation under the laws for the maintenance of public order.”³⁰¹ Thus, Ladébat accepted the Lockean idea that labor is central to property rights and took it one step further, using it to construct a hierarchy of such rights, with property acquired by labor at its summit. But at the same time, he rejected the Lockean idea that those rights are in any way natural or pre-political. A final noteworthy feature of Ladébat’s proposal was his articulation of the free alienability of property as a fundamental principle of law: “The social order requires that each person

297. *Id.* at 158.

298. The texts of many of these proposals are reprinted at *id.* 614-749.

299. *Id.* at 185, 307, 699.

300. *Id.* at 700.

301. *Id.*

possessed of property should be able to dispose of it to the greatest advantage. . . . Thus any condition imposed upon the transmission or possession of property that diminishes its value and is not freely redeemable is contrary to the social order."³⁰²

e. Marat: Rousseauian Egalitarianism

Marat, who was not a member of the Assembly, also published his own proposal in the middle of August.³⁰³ His proposal went far beyond even Sieyès' in insisting in that society has the duty to assist those without means. In Marat's view, the state must take an actively redistributive role to insure a relative equality of advantage. In a bombastic reworking of Rousseau, Marat railed against the great fortunes which "are almost all the fruit of intrigues, charlatanism, privilege, speculations, provocations and pillage: those who are glutted with superfluities ought to contribute to the needs of those who lack basic necessities."³⁰⁴ He, however, did not call for absolute equality of property, which he considered impractical, and recognized that a certain amount of inequality in property will result from the inequality of natural abilities. Rather, he insisted that citizens who have equal rights ought to enjoy "more or less" the same advantages, and that the law should intervene to prevent inequalities in property that do not reflect differences in ability, "by fixing limits that they may not exceed."³⁰⁵ Nevertheless, however great its reception on the streets of Paris, Marat's radical egalitarianism went so far beyond the proposals of the members of the Assembly, that as Rials concludes, "it is difficult to imagine that it could have had any influence at all" on them.

f. The Abolition of Feudalism

External events did, however, have an effect on the debates in the Assembly. All over France, mobs of hungry peasants began to take matters into their own hands, attacking the estates of the rich,

302. *Id.*

303. *Id.* at 189-90.

304. *Id.* at 739 ("[C]eux qui regorgent de superflu doivent subvenir aux besoins de ceux qui manquent du nécessaire."). Cf. 3 JEAN-JACQUES ROUSSEAU, *OEUVRES COMPLÈTES*, *supra* note 168, at 194 ("[I]l est manifestement contre la Loi de Nature . . . qu'une poignée de gens regorgent de superfluités, tandis que la multitude affamée manque du nécessaire.").

305. RIALS, *supra* note 5, at 739.

seizing their property, and burning the records of feudal land tenures. These developments had a double effect on the delegates in the capital. On the one hand, it became clear that if they were not to lose control of the situation, they would have to yield to the facts on the ground by moving to dismantle the legal structure of feudalism. Thus, on the night of August 4, 1789, the Assembly voted to abolish the feudal system, and within a few days, the financial emergency led to discussions of the expropriation of ecclesiastical property as well.³⁰⁶ On the other hand, if the Assembly did not move quickly to establish property rights on a firm basis, the wave of expropriations threatened to engulf all private property, including that of the bourgeoisie. During these discussions, Duport suggested that feudal obligations should be abolished without compensation, while Mounier insisted that they must be protected like any other form of property.³⁰⁷

Similarly, in the debate over ecclesiastical property, Sieyès insisted that compensation be paid, while Lacoste and Lameth opposed him on this point.³⁰⁸ Lameth rested his argument on a distinction between natural and artificial persons. Only natural persons enjoyed a natural right to property that was independent of society.³⁰⁹ Artificial persons such as ecclesiastical corporations, on the other hand, were created by society for its benefit. Thus, society could suppress such entities at will, and a fortiori it could modify or expropriate them.³¹⁰ Ultimately, the deputies of the First Estate voluntarily consented to relinquish their property, and in exchange the state agreed to undertake to provide for the maintenance of the clergy, of church buildings, and of the charitable work undertaken by the church.³¹¹

g. The Final Version

These matters occupied the Assembly from August 4 to August 12.³¹² On the twelfth, it was finally able to return to the debate over the Declaration of Rights. In order to break the impasse created by the seemingly endless multiplication of proposals, a new

306. *Id.* at 162, 191, 193.

307. *Id.* at 192.

308. *Id.* at 193-95.

309. *Id.* at 193.

310. *Id.*

311. *Id.* at 196-97.

312. *Id.* at 193-97.

committee of five, whose most energetic member was Mirabeau, was named. On the seventeenth, Mirabeau reported back to the Assembly with a new draft. This proposal included a guarantee of the right "to dispose of one's property as one wishes," and a declaration that any expropriation must be for public necessity and must be compensated.³¹³ But it omitted the theoretical justifications for these provisions contained in prior proposals insofar as it did not declare that the right to property was sacred, natural or inalienable. This omission was not accidental. As Mirabeau explained to the Assembly, the committee had difficulty distinguishing between natural and positive rights, and decided therefore to limit itself to those principles that it considered beyond dispute.³¹⁴ In any case, like earlier proposals, this new proposal failed to garner the support of the Assembly.

In the end, on August 19, the Assembly put the question of which proposal to adopt as a basis for its final deliberations to a vote. None of the proposals of the leading lights came even close winning a majority: Mounier's received four votes, Lafayette's forty-five and Sieyès' 245.³¹⁵ The draft that was ultimately chosen, with 605 votes, was a collective proposal, that of the Sixth Bureau of the Assembly.³¹⁶ A number of delegates were shocked by this choice, which they considered extremely mediocre; but as Target observed, the proposal of the Sixth Bureau was relatively short and uncontroversial, and was thus well-suited to serve as the basis for the final discussions.

The proposal of the Sixth Bureau was palpably more Lockean than that of Mirabeau's committee. But this was not the rigorous Lockeanism of Sieyès, but a rather "flaccid" Lockeanism that probably served as the "common denominator" of a majority of deputies.³¹⁷ If it downplayed the emphasis on the social contract and the right of self-determination, it nevertheless declared that the purpose of society is the protection of natural rights, and that the right to property is derived from the exercise the natural rights of freedom and self-preservation.³¹⁸ It thus at least implied—

313. *Id.* at 749 (arts. 11-12).

314. *Id.* at 388.

315. *Id.* at 212.

316. *Id.* For purposes of discussion, the Assembly had been divided on July 1 into thirty "*bureaux*" of forty members each. *Id.* at 119.

317. *Id.* at 214.

318. *Id.* at 621-22.

although it did not explicitly declare—that the right to property is itself natural and fundamental.

In the course of the following week, the entire Assembly heavily revised the draft of the Sixth Bureau article by article, with a number of sections completely rewritten. The result was a final draft that was markedly clearer, more forceful, and more felicitous in expression. The Lockean foundations underlying the Declaration as a whole and the right to property in particular were more sharply articulated. Thus on August 20, the initial articles were replaced by new material proposed by Mounier, leader of the moderates. The final version clearly declares in Article 2 that property is a natural right: “The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and the resistance to oppression.”³¹⁹

By August 26, the Assembly had at last come to the end of its revision of the Sixth Bureau’s draft, which it had reduced, in the final version, to sixteen articles. But this was not quite the end of its work. Duport took the floor and submitted an article guaranteeing the right to compensation for expropriation, which was to become the last article, Article 17 of the final version of the Declaration: “Property being a sacred and inviolable right, no one can be deprived of it unless a legally established public necessity evidently demands it, under the condition of a just and prior indemnity.”³²⁰ This article was adopted without modification “in spite of agitated debates about which little is known.”³²¹

However, this was not quite the end. Although the Assembly had enacted Article 17 with the word “Property” (*la propriété*) in the singular, it appears that the president of the Assembly, Clermont-Tonnerre, with the concurrence of several others in the secretariat, including Talleyrand, modified this word to the plural form (*les propriétés*) on the evening of the twenty-sixth.³²² The purpose of this change, as Marc Suel has argued, was apparently to make clear that the provision extended to all forms of property,

319. *Id.* at 22 (“Le but de tout association politique est la conservation des droits naturels et imprescriptibles de l’homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l’oppression.”).

320. *Id.* at 26 (“La propriété étant un droit inviolable et sacré, nul ne peut en être privé, que si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous la condition d’une juste et préalable indemnité.”)

321. *Id.* at 255.

322. *Id.* at 269.

including those feudal rights that were not simply abolished, but were instead made redeemable during the night of August 4.³²³ It was this altered version that received the assent (*acceptation*) of Louis XVI in October 1789.³²⁴ The singular form was only restored when the Declaration was incorporated into the Constitution of 1791.

2. The Right to Property in the Revolutionary Constitutions

a. The Constitution of 1791

The Constitution of 1791 incorporated the Declaration of 1789, which was placed at its head. In the meantime, the Assembly had voted for the confiscation of ecclesiastical property, severely testing the strength of the principles they had just enshrined in the Declaration, and reopening the debate over the basis and the limits of the right to property. Some proponents of the confiscation rather opportunistically resorted to arguments that seemed flatly to contradict the Declaration's assertion that property is a sacred and inviolable natural right. For example, Mirabeau urged that "all property is 'a benefit (*bien*) acquired by virtue of the laws': the state can deprive individuals and corporate bodies of their goods, without paying them compensation."³²⁵ Thouret, echoing Lameth's arguments from 1789, drew a distinction between individual and corporate property. Individuals have natural rights to property, he argued, but corporations are creatures of the law, and what the law creates, it can limit or destroy: "For the same reason that the suppression of a corporation is not a homicide, the revocation of its property rights is not a spoliation."³²⁶ Many clerics were unimpressed by this reasoning. Ultimately, however, the Assembly justified the confiscation on the grounds that church property was merely held in trust for the benefit of the people, and that the church hierarchy, by neglecting its pastoral duties and abusing its wealth to maintain itself in luxury had forfeited this trust. Thus the

323. Marc Suel, *La déclaration des droits de l'homme et du citoyen. L'énigme de l'article 17 sur le droit de propriété. La grammaire et le pouvoir*, 1974 REVUE DU DROIT PUBLIC 1295.

324. RIALS, *supra* note 5, at 270-71.

325. SCHLATTER, *supra* note 25, at 223.

326. *Id.*

state was merely taking over the administration of these properties to ensure that they were used for their intended purposes.³²⁷

The main text of the Constitution of 1791 repeated the guarantees of protection of property as a natural right contained in the Declaration, but also reconfirmed the abolition of feudal privileges and the confiscation of ecclesiastical property.³²⁸ It also introduced another highly significant measure for the protection of property rights by imposing property qualifications for the franchise.³²⁹ These qualifications, which took the form of a distinction between "active" and "passive" citizens, combined with a series of indirect electoral mechanisms, were the brainchild of Sieyès. Only active citizens, defined as males over twenty-five years old who paid taxes in the amount of at least the wages of three days of unskilled labor, were qualified to vote for electors who sat in departmental assemblies.³³⁰ Those electors, who were subject to much higher property qualifications varying by location, in turn chose delegates to the National Assembly itself.³³¹ This system was not dissimilar to that advocated by Madison in the United States, although he succeeded only in incorporating indirect elections for the President and the Senate into the Constitution, and leaving it up to the states to impose property qualifications at their discretion. While it is difficult to make direct comparisons, this system may have been more democratic than that in some American states but less democratic than that in others.³³²

b. Robespierre and the Constitution of 1793

The Constitution of 1791, which attempted to establish a constitutional monarchy, lasted less than a year before it collapsed. The king was privately bent on subverting the new order that he

327. *Id.* at 225

328. 1791 CONST., pmbl. (proclaiming the abolition of the feudalism and venal and hereditary office), tit. I (guaranteeing the inviolability of property and compensation for expropriation but confirming the (uncompensated) confiscation of church property), in *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, at 35-36 (Jacques Godechot ed., 1979).

329. *Id.* tit. III, ch. 1, §§ II-IV, in *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 328, at 40-43.

330. PALMER, *supra* note 6, at 523.

331. *Id.* at 522-28.

332. Palmer suggested that the French system excluded no more than one-fourth of adult males as primary electors, and was perhaps less restrictive than that in Pennsylvania, possibly the most democratic of the American states, but more restrictive than in Massachusetts. *See id.* But Godechot suggested that it excluded about half the adult males. *See LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 328, at 31.

had ostensibly accepted, and after a series of flirtations with foreign enemies and an attempted escape, in the summer of 1792 he welcomed a series of military disasters as heralding the restoration of his absolute power. Instead, in August a violent mob stormed his palace, slaughtering his bodyguards. The new Legislative Assembly, barely ten months into its term, suspended the monarchy and prepared to yield power to a new body, the Convention, which was elected by universal suffrage (although in fact only about a tenth of the electorate actually participated). The Convention declared a republic, sent the king to the guillotine, and set about drafting a new constitution.

Although more radical than their predecessors, the deputies to the Convention were no enemies of private property. In February, the Girondins who dominated the government in early 1793 proposed a new constitution that sought in fact to strengthen the right to property. Drafted largely by Condorcet, it contained for the first time a definition of property that echoed the absolutist definitions propounded by civil-law scholars going back to Bartolus, and restated the guarantee of compensation in more emphatic form.³³³ Alarmed by the radical attacks on property by the *enragés* or "madmen" in the popular associations, which they feared would alienate the peasants from their cause, in March 1793 the Convention passed a measure imposing the death penalty on anyone proposing an agrarian law.

Robespierre dismissed the talk of an agrarian law as a "phantom concocted by scoundrels to terrify imbeciles."³³⁴ But he objected strongly to the absolutist rhetoric of property rights contained in Condorcet's proposal. Robespierre ridiculed the idea that all property rights were sacred and absolute. The slave-trader's property, he pointed out, was the human cargo chained in his ship; the French king's property was his hereditary right to oppress his twenty-five million subjects as he saw fit. "In defining liberty, the first and most sacred of the natural rights of man, you have rightly stated that that it was limited by the rights of others: Why then have you not applied this principle to the right of property, which

333. 1793 CONST. ("Girondin" Constitution), PROJET DE DÉCLARATION DES DROITS NATURELS, CIVILS, ET POLITIQUES DES HOMMES art. 21, in L. DUGUIT, ET AL., LES CONSTITUTIONS DE LA FRANCE 33, 34 (Georges Berlia, ed., 7th ed. 1952).

334. MAXIMILIEN ROBESPIERRE, *Sur la nouvelle Déclaration de Droits* (Apr. 24, 1793), in 9 OEUVRES DE MAXIMILIEN ROBESPIERRE 459, 459 (M. Bouloiseau, et al. eds., 1910-1967).

is a social institution? As if the eternal laws of nature were less inviolable than human conventions!”³³⁵ In place of the absolutist definition of property suggested by Condorcet, Robespierre proposed the following propositions:

Art. I. Property is the right of each citizen to enjoy and dispose of the portion of goods that is guaranteed to him by the law.

II. The right of property is limited, like all others, by the obligation to respect the rights of others.

III. It may harm neither the security, nor the freedom, nor the existence, nor the property of our fellows.

IV. Any possession or traffic that violates this principle is illicit and immoral.³³⁶

Robespierre also proposed the adoption of a system of progressive taxation.³³⁷

Ultimately, however, although the Jacobins triumphed over the Girondins in the convention, they rejected Robespierre’s proposals and retained those of Condorcet largely unchanged. The Jacobin (or more specifically, Montagnard) Constitution of June 24, 1793 (Year I), which never entered into force, retained and even strengthened the property guarantees of 1789.³³⁸ Repeating the Bartolist formulation of Condorcet with only minor changes, the 1793 Declaration of Rights defined property as “the right which belongs to every citizen to enjoy and to dispose of at his pleasure his goods, his income, and the fruit of his labor and his skill.”³³⁹ The prohibition on expropriation without just compensation reappeared in the new Declaration in an even more emphatic form.³⁴⁰

Nevertheless, for the first time in history, the Montagnard Constitution recognized that the right to property entails social responsibilities. It abolished slavery.³⁴¹ It proclaimed a social duty to provide for the welfare of the indigent: “Public assistance is a sacred debt. Society owes maintenance to unfortunate citizens, ei-

335. *Id.* at 461.

336. *Id.*

337. *See id.*

338. 1793 CONST. (“Jacobin” or “Montagnard” Constitution) arts. 1-2, *in* DUGUIT, ET AL., *supra* note 333, at 62.

339. *Id.* art 16.

340. In place of the language in the 1789 declaration (article 17) stating that “no one may be deprived” of property, the 1793 text (article 19) emphasizes that “no one may be deprived of the slightest portion of his property” (emphasis added).

341. *Id.* art 18.

ther in procuring work for them or in assuring the means of existence for those who are unable to labor."³⁴² It recognized a social duty to foster public education.³⁴³ These provisions represented at least a partial vindication of the views of Robespierre and of Sieyès before him. In terms of ultimate historical influence, the recognition of the social aspect of property rights in the Constitution of 1793 was undoubtedly more significant than its absolutist rhetoric.

c. The Thermidorian Constitution of 1795: Property as a Social Right

The 1793 Constitution, which was supposed to take effect once peace had been restored to France, remained both literally and figuratively suspended, locked in a cedar ark dangling above the legislative chamber, as the provisional revolutionary government of the Convention dissolved into the Terror. After the coup of Thermidor, the war continued, and the Girondins and former constitutional monarchists who now dominated the government were disinclined to implement a constitution enacted by their radical former enemies. Therefore the Thermidorians set about preparing a new constitution that would stabilize the political situation and consolidate property rights, while eliminating the egalitarianism, universal suffrage, and the social welfare guarantees of its Montagnard predecessor. The Constitution of 1795 (Year III) repudiated the Rousseauian ideology of the Jacobins and turned instead to Montesquieu for inspiration: Indeed, it was less progressive not only than the constitution of 1793, but even than the Constitution of 1791.³⁴⁴ Many members of the Convention doubted the need for a declaration of rights, fearing that it could only become the source of democratic agitation.³⁴⁵ But in the end it was decided to retain a declaration, albeit in much modified form.

Thus, the subversive first article of the 1789 Declaration, declaring that all men are born and remain equal in rights, was deleted because of fears it could lead to demands for a redistribution of property. Even the notion of natural rights was dropped: After, all, if property were a natural right, then perhaps everyone might claim a share. Instead, liberty, equality, security and property were

342. *Id.* art. 21.

343. *Id.* art. 22.

344. 1795 CONST., in DUGUIT, ET AL., *supra* note 333, at 73.

345. *Id.* at 95.

declared to be social rights (*droits de l'homme en société*).³⁴⁶ Thus, paradoxically, the Jacobins, who idolized Rousseau, endorsed (over Robespierre's objection) the notion that property is a natural right, which Rousseau had harshly attacked; the Thermidorians, on the other hand, who rejected Rousseau's egalitarianism, nevertheless agreed with him that property is a conventional right.³⁴⁷

Naturally, the Thermidorians deleted from the Constitution the rights to work, to welfare assistance, and to education (although not the abolition of slavery). They retained from their Jacobin predecessors the absolutist definition of the right to property.³⁴⁸ For the first time, they also supplemented the declaration of rights with a declaration of duties, the last two of which reiterated the duty to respect property rights.³⁴⁹ The guarantee of compensation for expropriations was transferred from the declaration of rights to the main text of the Constitution itself, which, at 377 articles, was far longer than its predecessors. Article 358 guaranteed the right to compensation in exactly the same terms as the Constitution of 1791.³⁵⁰ But Articles 373 and 374 made it clear that property confiscated from the church and émigrés was not to be returned.³⁵¹

d. The Napoleonic Constitutions and the Civil Code

The Constitution of 1799 (Year VIII),³⁵² which ushered in the Napoleonic regime, and the Constitutions of 1802 (Year X)³⁵³ and 1804 (Year XII),³⁵⁴ which consolidated it, dispensed with declarations of rights and detailed provisions on property. Far more important than these in guaranteeing private rights was the Civil Code promulgated in 1804. While constitutions have come and gone, the *Code Napoléon* has endured. As has often been observed, the Code has for two centuries enjoyed a quasi-

346. *Id.* art. 1.

347. *Id.* Droits art 15.

348. *Id.* Droits art. 5.

349. *Id.* Devoirs arts. 8-9.

350. *Id.* art. 358.

351. *Id.* arts. 373-374.

352. 1799 CONST., in DUGUIT, ET AL., *supra* note 333, at 109.

353. SÉNATUS-CONSULTE ORGANIQUE DE LA CONSTITUTION DU 16 THERMIDOR AN X (Aug. 4, 1802), in DUGUIT, ET AL., *supra* note 333, at 120.

354. SÉNATUS-CONSULTE ORGANIQUE DU 28 FRIMAIRE AN XII (Dec. 20, 1803), in L. DUGUIT, ET AL., *supra* note 333, at 129.

constitutional and almost sacred status in France. Arguably, at least until the past few decades, it has been the most important source of protections of individual rights.

Although the Code does not expressly endorse a specific theory of property rights, remarks by the drafters (Treilhard, Grenier, and especially the most eminent among them, Portalis) embraced the Lockean theory of natural right.³⁵⁵ Moreover, article 544 forcefully restated the absolutist civilian definition of property that had been incorporated into the Constitutions of 1793 and 1795, while article 545 reechoed previous guarantees of compensation for expropriation.³⁵⁶ Thus the effect of the Napoleonic codification was to entrench the guarantee of property rights more effectively and permanently than the ephemeral revolutionary constitutions had done and to strengthen the perception of those rights as absolute and grounded in natural law.

e. The Emergence of Constitutional Review

Subsequent French constitutions, including the Charters of 1814 and 1830 and the Constitutions of 1848 and 1852, reincorporated the same formulations of the right to property encountered in the revolutionary constitutions.³⁵⁷ Although the Constitution of the Third Republic (1875) contained no general bill of rights, the Constitutions of the Fourth (1946) and Fifth (1958) Republics incorporated by reference the guarantees of property rights proclaimed in the Declaration of 1789. Nevertheless, for nearly two centuries, the legislature had sole discretion to implement and enforce these reiterated constitutional guarantees. The experience of the *ancien régime*, under which the *parlements* or high courts had asserted their power to block reformist legislation on the ground that it violated fundamental higher law, was critical in crystallizing hostility to any form of judicial review.³⁵⁸ This experience, combined with a Rousseauian ideology that conceived of legislation as the infallible embodiment of the sovereign general will, led to the development of a stricter conception of the separation of powers in France than in America, a conception incompatible with the no-

355. SCHLATTER, *supra* note 25, at 231-234.

356. C. CIV. arts. 544-545 (Fr.).

357. See Jean Morange, *La Déclaration et le droit de propriété*, in 8 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 101, 106-07 (1988).

358. See JOHN P. DAWSON, ORACLES OF THE LAW 362-73 (1968).

tion of any external check on the legislature other than the people themselves.

A few of the framers of the revolutionary constitutions, most notably the abbé Sieyès, rejected this ideology, and proposed various mechanisms of constitutional review. For example, in 1793, Sieyès proposed the establishment of an elected *grand juré* with the power to block the promulgation of legislation that violated fundamental rights,³⁵⁹ and in 1795 he submitted a plan for a *jury constitutionnaire*, to be periodically renewed from among outgoing members of the legislative assembly by a process of staggered co-optation.³⁶⁰ In the constitution of 1799 Sieyès actually succeeded in endowing the appointed Senate with the power to invalidate legislation as unconstitutional on the referral of the government, although the Senate never actually exercised this power, and this same mechanism (also never used) was also formally resuscitated by Napoleon III.³⁶¹ These proposals were important antecedents to twentieth-century developments, including both the influential model of centralized constitutional review introduced by Hans Kelsen into the Austrian Constitution of 1920, as well as the system of constitutional review that emerged in France itself under the Fifth Republic.

But when they were first introduced in the eighteenth century, all of these proposals were overwhelmingly rejected on the grounds that the people themselves could be trusted to protect their fundamental rights. Judicial constitutional review of legislation was expressly prohibited by a series of statutory and legislative provisions, and an article of the Napoleonic penal code, still in effect today, made judicial action “suspending application of one or several laws or by deliberating on whether or not a law will be published or applied” a criminal offense punishable by the loss of civil rights.³⁶²

By the second half of the nineteenth century, however, the idea of judicial review had been widely rehabilitated in French legal thought. As Alec Stone has shown, by the late nineteenth and

359. ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 27 (1992).

360. PASQUALE PASQUINO, *SIEYES ET L'INVENTION DE LA CONSTITUTION EN FRANCE* 12-13 (1998). Pasquino reproduces the text of Sieyès' proposal in an appendix. *Id.* at 193-96.

361. See STONE, *supra* note 359, at 30.

362. *Id.* at 25, 264 n.10 (quoting C. PÉN. art. 127 (Fr.)).

early twentieth centuries, virtually every major figure in French public law had repudiated the Rousseauian ideology in favor of the idea of judicial review based on natural rights.³⁶³ But the appearance in 1921 of Édouard Lambert's classic study of Lochnerism³⁶⁴ stopped this movement in its tracks. Lambert pointed to the reactionary jurisprudence of the U.S. Supreme Court and warned that instituting judicial review in France would result in the permanent imposition by judges of *laissez-faire* capitalism, stifling any efforts at social and economic reform. Almost overnight, the scholarly consensus in favor of judicial review began to evaporate, and political support for it collapsed.³⁶⁵

It was only under the Fifth Republic, in the latter part of the twentieth century, that the concept of constitutional review was finally accepted, and a constitutional jurisprudence of property rights began to emerge. The protagonist in this development was the *Conseil constitutionnel* or Constitutional Council, which was originally created to protect the executive branch from legislative encroachment, but had begun by 1971 to exercise general powers of constitutional review. These powers, however, are more constrained than the corresponding powers of judicial review enjoyed by U.S. courts. The *Conseil constitutionnel*, which is technically not a court, is the sole body empowered to review legislation for unconstitutionality. It may do so only during the short period after legislation has been enacted but before it has been promulgated. Thus, while constitutional review in the United States is diffuse, concrete, and *a posteriori*, in France it is centralized, abstract, and *a priori*.

In a landmark 1982 decision, the *Conseil constitutionnel* affirmed that the right of property enunciated in the Declaration of 1789 enjoys full constitutional force (*valeur constitutionnelle*), and invalidated numerous aspects of Socialist legislation seeking to nationalize large industrial corporations and banks.³⁶⁶ The Socialist government had sought to rely on the following provision in the preamble of the 1946 Constitution: "Every asset, every enterprise, whose exploitation is or has acquired the character of a national public service or a de facto monopoly, must become the property

363. *Id.* at 35-39.

364. ÉDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS (1921).

365. See STONE, *supra* note 359, at 41-42.

366. CC decision no. 81-132 DC, Jan. 16, 1982, Rec. 17.

of the collective.”³⁶⁷ Because the 1958 Constitution incorporated by reference both the principles of the 1789 Declaration and of the preamble of the 1946 Constitution, the Socialists argued that in case of conflict, the latter superseded the former. Rejecting this argument, the *Conseil constitutionnel* ruled that the 1789 principles were supreme, and that those of 1946 could complement but could never contradict them.³⁶⁸ Furthermore, it ruled that not only is the right to property a fundamental constitutional value, so is the freedom of private enterprise (*la liberté d’entreprendre*).³⁶⁹

The most significant provision of the nationalization project invalidated by this decision was the formula for compensation of affected shareholders. The Socialists had proposed to assess compensation under a multifactor formula based on the expropriated companies’ assets as well as the three-year average of share prices and profits, in order to reduce any unfairness resulting from short-term fluctuations in value. According to the *Conseil constitutionnel*, the correct procedure was instead to assess these amounts as of “the day of the property transfer, taking into account the influence which the prospect of nationalization might have had on the value of their shares,” or as Alec Stone has aptly put it, to hypothesize “*what the price of any given stock would have been . . . had the Socialists not won the election.*”³⁷⁰

The result was of this decision was to confer an enormous windfall to the shareholders of the nationalized companies. As Stone has pointed out, the final result of the struggle involving the Government, the *Conseil d’État*, and the *Conseil constitutionnel*, was that the affected shareholders received a fifty percent premium on the market value of their shares: “No stockholder who has ever been bought out by a modern, industrial state, in any major nationalization, has ever enjoyed terms as good as those in France in 1982.”³⁷¹ The anticipated public benefits of the nationalization project were eliminated, and it in fact was the public at large, as well as the stockholders whose property was not nationalized (and were thus not sheltered from the general decline in stock values that had occurred), who were treated unfairly.

367. STONE, *supra* note 359, at 146.

368. *See id.* at 160.

369. *Id.*

370. *Id.* at 161.

371. *Id.* at 165; cf. François Luchaire, *Doctrine, nécessité, ou poésie?*, in NATIONALISATIONS ET CONSTITUTION 65 (Louis Favoreu ed., 1982).

At the jurisprudential level, the 1982 decision seemed to vindicate Lambert's warning that the adoption of the institution of constitutional review would result in the Lochnerian imposition of *laissez-faire* capitalism as a matter of constitutional law. By elevating the extratextual right of free enterprise to the status of a fundamental constitutional right, the *Conseil constitutionnel* seemed clearly to signal that in its view socialism was incompatible with the French Constitution.³⁷² It was a view very much in harmony with those of the *Lochner* court, and at odds with the dissenting position of Justice Holmes that "a Constitution is not intended to embody a particular economic theory" such as *laissez faire*.³⁷³

Nevertheless, subsequent jurisprudential developments have not borne out fears of the rise of a new Lochnerism *à la française*. In fact, the 1982 decision itself rejected an absolutist conception of property rights, emphasizing that such rights "have undergone an evolution characterized . . . by limitations required by the general interest," and subsequent decisions have tended to affirm the social limitations of the right to property.³⁷⁴ Parallel developments in the jurisprudential interpretation of the property guarantee of the European Convention on Human Rights, which expressly reserves "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest,"³⁷⁵ has reinforced this tendency. As a result, the *Conseil constitutionnel* has developed nothing comparable to the extensive regulatory takings jurisprudence of the U.S. Supreme Court.³⁷⁶

IV. PROPERTY AS A NATURAL AND AS A POSITIVE RIGHT IN U.S. CONSTITUTIONAL JURISPRUDENCE

The U.S. Constitution never adopted an explicit theory of the nature of the right to property, and throughout its history the Supreme Court's jurisprudence of property rights has reflected a profound conflict between jusnaturalism and positivism. The first major salvos in this debate emerged in the dueling opinions of

372. Louis Favoreu, *Une Grande Decision*, in NATIONALISATIONS ET CONSTITUTION, *supra* note 371, at 19, 41-42.

373. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

374. See ANNE-FRANÇOISE ZATTARA, LA DIMENSION CONSTITUTIONNELLE ET EUROPÉENNE DU DROIT DE PROPRIÉTÉ 130, 165 (2001) (quoting CC decision no. 81-132 DC, Jan. 16, 1982, Rec. 17).

375. First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221.

376. See ZATTARA, *supra* note 374, at 477-86, 493-97.

Justices Chase and Iredell in *Calder v. Bull*.³⁷⁷ According to Justice Chase, “general principles of law and reason forbid” the legislature from passing any act that would impair “the right of an antecedent lawful private contract; or the right of private property.”³⁷⁸ Following this reasoning, natural law protects property rights against legislative infringement even in the absence of any specific constitutional guarantee. To maintain the contrary is “political heresy.”³⁷⁹ But even Justice Chase, the antebellum Court’s most forceful champion of natural rights, was no orthodox Lockean. He conceded that “the right of property, in its origin, could only arise from compact express, or implied”; this right “is conferred by society; is regulated by civil institution, and is always subject to the rules prescribed by positive law.”³⁸⁰ Chase was thus much closer to Grotius and Pufendorf than to Locke: property rights are at the same time both natural and conventional, and are subject to positive regulation.

In contrast, Justice Iredell rejected judicial review based solely on the “abstract principles of natural justice”: In the absence of an express constitutional restraint, “private rights must yield to public exigencies.”³⁸¹ Because the requirements of natural law are indeterminate, it cannot form the basis of constitutional adjudication: “The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject.”³⁸² Thus, in Iredell’s view, the judiciary has no greater right to pronounce upon the subject than the legislature.

In the property-rights jurisprudence of the Marshall Court, the Contracts Clause took center stage. The Framers clearly regarded this clause as the most important specific guarantee of property rights, inserting it, unlike the others, into the original document of 1787. Moreover, in our federal system, property rights are primarily a matter of state law; unlike the Due Process and Takings Clauses, the Contract Clause specifically bound the state governments. Under Chief Justice Marshall, by construing land grants and corporate charters as protected contracts, the Court gave the Clause broad scope. At the same time, by protect-

377. 3 U.S. (3 Dall.) 386, 388 (1798).

378. *Id.* at 388 (Chase, J.).

379. *Id.* at 389.

380. *Id.* at 394.

381. *Id.* at 400.

382. *Id.* at 399.

ing land titles and corporate charters as contracts rather than specifically as property in cases like *Fletcher v. Peck*³⁸³ and *Dartmouth College v. Woodward*,³⁸⁴ the Court deftly "avoided the problem of whether property rights rested on natural or positive law."³⁸⁵

Although the Court compelled the states to respect the private-law rights they had created by positive enactments, it recognized their power to alter those rights prospectively. The constitutional protection of the right to property thus did not prohibit the states from defining and regulating property rights as a matter of positive law in a way that did not infringe "vested" interests. Chief Justice Marshall was himself rather sympathetic to the idea of basing constitutional property and contract rights on natural law, but in *Ogden v. Saunders*,³⁸⁶ the only major constitutional decision in which he could not muster a majority, he failed to incorporate his jusnaturalist views into the case law.

The *Ogden* Court upheld a bankruptcy law that applied only prospectively but did not affect contracts concluded prior to its enactment. Henry Wheaton (along with Daniel Webster) argued the act was unconstitutional. This argument was preserved in a detailed record contained in the case report prepared by Wheaton. Relying heavily on civilian natural law authorities from Justinian to Grotius, Burlamaqui, Vattel and Pothier, Wheaton argued that the "obligation of contracts" arises from universal natural law, not positive law, and that positive law is therefore powerless to impair it.³⁸⁷ Chief Justice Marshall, writing for himself, Justice Story and Justice Duvall, accepted this natural law argument. His treatment of this issue, although it cites no specific authorities, seems to owe as much to Locke as to the civilians.³⁸⁸ Property and contract rights, according to Marshall, are prior and superior to rights created by positive law; they "are not given by society, but brought into it."³⁸⁹

The other four justices, however, found the opposing arguments advanced by Henry Clay more persuasive. In seriatim opinions each of these justices rejected the view that constitutional

383. 10 U.S. (6 Cranch) 87 (1810).

384. 17 U.S. (4 Wheat.) 518 (1819).

385. WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 121 (1977).

386. 25 U.S. (12 Wheat.) 213 (1827).

387. *Id.* at 222-23 (argument of Henry Wheaton); *cf. id.* at 240-41 (argument of Daniel Webster).

388. *Id.*

389. *Id.* at 346.

rights to property and contract could be determined by reference to natural rather than positive law. According to Justice Washington, "whenever they come into collision with each other," positive law "is paramount" and natural law "is to be taken in strict subordination to [it]."³⁹⁰ Justice Johnson observed that "our constitution no where speaks the language of men in the state of nature,"³⁹¹ and that "in a state of society," "the State decides how far the social exercise of the rights [of contract] can be justly asserted."³⁹² Because the Constitution expressly empowers the government to regulate bankruptcies, Justice Thompson noted, it can hardly be argued that the exercise of such a power was "a violation of the eternal and unalterable principles of justice" embodied in natural law.³⁹³ And Justice Trimble, while admitting that property and contract rights originate in natural law, nevertheless insisted that, upon entering civil society, people "necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government" and those rights are thus "subject to be regulated, modified, and, sometimes, absolutely restrained, by the positive enactments of municipal law."³⁹⁴

The Taney Court further extended the limitations on protection of property rights under the Contracts Clause.³⁹⁵ The ultimate result of these antebellum developments was that property rights were constitutionally protected as positive rights under the contracts or charters that created them, but not as natural rights existing independent of those contracts or charters. In effect, the Court recognized the right of democratic governments to define those rights prospectively as they saw fit, provided that they did not trench upon vested interests created by prior enactments. The Court rejected the arguments of Marshall and Story that would have protected a much broader range of interests, which they regarded as vested as a matter of fundamental law and thus immune even from prospective alteration. By the latter part of the nineteenth century, the Contracts Clause had been eclipsed as an effective bulwark of property rights. States were able to limit its reach

390. *Id.* at 259 (Washington, J.).

391. *Id.* at 290 (Johnson, J.).

392. *Id.* at 282.

393. *Id.* at 312 (Thompson, J.).

394. *Id.* at 319-20 (Trimble, J.).

395. See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (declining to construe a corporation's privileges as exclusive).

substantially by inserting reservation clauses into charters and contracts, and the Supreme Court contributed to its demise by construing contracts and charters strictly and by recognizing that they are subject to police power regulation.³⁹⁶

The Due Process and Takings Clauses of the Fifth Amendment initially played only a minor role in the constitutional protection of property rights. Most regulation of property was a matter of state law, and in *Barron v. Baltimore*³⁹⁷ the Supreme Court confirmed that the Bill of Rights, and the Fifth Amendment in particular, did not apply to the states.³⁹⁸ In the absence of an applicable federal constitutional provision, the state courts fell back on the state constitutions for the protection of property rights. But in the early nineteenth century, many state constitutions also contained no provision guaranteeing compensation for expropriation. As we have seen, Massachusetts was the only of the original thirteen states to have such a provision, and although most of the subsequently admitted states likewise included one in their new constitutions, the original states were slow to follow suit.³⁹⁹ By the outbreak of the Civil War six of them (including all of the original Southern states) still had not done so.⁴⁰⁰

Nonetheless, the lack of explicit constitutional provisions was not an impediment to the development of a state constitutional jurisprudence of property rights. Lacking an explicit basis for constitutional protection of property rights either in their own written constitutions or in the common law tradition, state courts drew upon the natural rights theories of civil law theorists such as Grotius and Pufendorf. It was thus the state courts interpreting state constitutions, rather than the federal courts, that took the lead in the antebellum era in developing a constitutional jurisprudence of property as a natural right.

The leading decision was *Gardner v. Trustees of the Village of Newburgh*,⁴⁰¹ in which the New York Chancery Court invalidated a

396. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 93, 115-16 (2d ed. 1998).

397. 32 U.S. (7 Pet.) 243 (1833).

398. *Id.* at 250-51.

399. J.A.C. Grant, *The "Higher Law" Background of Eminent Domain*, 6 WIS. L. REV. 67, 70 (1931).

400. See *id.* at 70 nn.15-17. Of the original states, the following adopted compensation provisions before the Civil War: Pennsylvania (1790); Connecticut (1818); New York (1821); Rhode Island (1842); and New Jersey (1848).

401. 2 Johns. Ch. 162 (N.Y. Ch. 1816).

state statute providing that water might be taken from a certain spring on private land for public purposes. Chancellor Kent had no difficulty in striking down the statute despite the fact that New York at this time had no constitutional bill of rights whatsoever, let alone an express provision requiring compensation for expropriation. He was satisfied to cite Grotius, Pufendorf, and Bynkershoek for the proposition that “natural equity” required compensation.⁴⁰²

Similar decisions issued from most other state courts, likewise relying largely on the civilian natural law authorities. Indeed, a number of courts went out of their way to insist that their decisions on this point rested on natural justice, and any express constitutional protection of property was thus superfluous.⁴⁰³ Some of these decisions adhered to the position of Grotius that eminent domain rests on an implied reservation by the state accompanying the original grant; others preferred the view of Pufendorf that it is an inherent attribute of sovereignty.⁴⁰⁴ Alongside these civilian justifications for eminent domain, antebellum state courts also imported the civilian *jusnaturalist* doctrine of public use. But these courts transformed that doctrine, which in the civilian sources was in essence merely a hortatory constraint, into a mandatory unwritten constitutional limitation. As Matthew Harrington has shown, after the passage of the Fourteenth Amendment, these arguments were subsequently utilized by the federal courts to transform the “public use” provision of the federal Takings Clause from a descriptive provision, indicating simply that the Clause applies to exercises of eminent domain (but not, for example, fines or forfeitures), into a proscriptive restriction limiting the eminent domain power itself. Unfortunately, as Harrington has pointed out, these attempts to transform a hortatory admonition into an enforceable constitutional limitation foundered in the absence of a “coherent basis for distinguishing between ‘public’ and ‘private’ uses” and thus only “left confusion in their wake.”⁴⁰⁵ At the same time, these courts tended to emphasize the absolute rights rhetoric of civilian *jusnaturalist* doctrine, while stripping it of its strong component of social obligation.

402. *Id.* at 166.

403. *See, e.g.,* *Young v. McKenzie*, 3 Ga. 31, 44 (1847); *Henry v. Dubuque*, 10 Iowa 540, 543-44 (1860); *see generally* Grant, *supra* note 399.

404. *See* Harrington, *supra* note 269, at 1250 n.15 (citing cases).

405. *Id.* at 1257.

The passage of the Fourteenth Amendment in 1868 radically altered federal constitutional property jurisprudence. The Fourteenth Amendment by its express terms prohibited the states from depriving any person of property without due process of law.⁴⁰⁶ Late nineteenth- and early twentieth century courts seized upon this due process provision, now expressly applicable to the states, to construct a jurisprudence of heightened protection of property rights. The history of substantive due process in the *Lochner* era, during which the Court struck down a host of Progressive enactments aimed at ensuring public health and safety and improving working conditions by measures establishing minimum wages,⁴⁰⁷ maximum hours,⁴⁰⁸ restrictions on child labor⁴⁰⁹ and so forth, is well known. At least in its most notorious decisions, the *Lochner* Court elevated the principle of laissez-faire capitalism, and the voluntaristic and individualistic assumptions underlying late nineteenth-century common law, to the status of immutable laws of nature. Calvin Coolidge well reflected the spirit of his age when he grandiosely declared that the right to property was secured not merely by positive law, but was "founded upon the constitution of the universe."⁴¹⁰

The activism of the *Lochner* Court, as evidenced by its expansive view of property rights at the expense of legislative reform efforts, undermined respect for the institution of constitutional judicial review both within the United States and throughout the world. Ultimately, this activism provoked a serious constitutional crisis that imperiled the authority of the judiciary and elicited threats from President Roosevelt to pack the Supreme Court. In 1937, the Court abruptly backed down with its decision in *West Coast Hotel v. Parrish*,⁴¹¹ which sustained a minimum wage law similar to those it had struck down in earlier decisions. *Parrish* was the death knell of substantive due process protection of property rights. The following year, the Court announced a new and radically different approach in *United States v. Carolene Products Company*.⁴¹² Thenceforth it applied a much more deferential stan-

406. U.S. CONST. amend. XIV.

407. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

408. *Lochner v. New York*, 198 U.S. 45, 45 (1905).

409. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922).

410. CALVIN COOLIDGE, HAVE FAITH IN MASSACHUSETTS 6 (2d ed. 1919).

411. 300 U.S. 379 (1937).

412. 304 U.S. 144, 152 n.4 (1938).

dard ("rational basis" review) in reviewing legislation that infringed property rights, and reserved stricter scrutiny for measures that infringed personal liberties. That basic approach survives to this day.

In the wake of this constitutional revolution, the Court turned for the constitutional protection of property rights from the discredited doctrine of economic substantive due process to the Takings Clause. During the Gilded Age and the *Lochner* era the doctrine of substantive due process was often said to encompass the principle that private property may not be taken for public use without justification. This idea rested on the then-dominant conception of property as a natural right, rather than on any formal notion of incorporation. But once the Court discredited due process as a basis for activist judicial protection of property rights, courts began to recast critical due process precedents as Takings Clause decisions. The Supreme Court's decision in *Chicago, Burlington and Quincy Railroad Company v. City of Chicago*⁴¹³ is now widely regarded as the first application of the doctrine of incorporation. Courts cite to this case for the now-settled proposition that the Fourteenth Amendment incorporates the protections of the Takings Clause of the Fifth Amendment against the states.⁴¹⁴ But as recent scholarship has demonstrated, that decision rested essentially on the due process clause; the notion that it incorporated the takings clause is a gloss put on it by subsequent case law.⁴¹⁵

Another *Lochner*-era substantive due process decision, *Pennsylvania Coal Company v. Mahon*,⁴¹⁶ which after the triumph of the New Deal lay moldering for decades in the jurisprudential dustbin, was likewise later exhumed and tartered up as a takings case.⁴¹⁷ So effective was this makeover that today the case is hardly associated with substantive due process at all, and is widely hailed as the foundation of modern regulatory takings jurisprudence. Only the posthumous prestige of its author Oliver Wendell Holmes can account for this remarkable transformation. As Robert Brauneis has pointed out, many *Lochner*-era decisions foreshadowed the regu-

413. 166 U.S. 226 (1897).

414. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 428 U.S. 104, 122 (1978).

415. See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826 (2006).

416. 260 U.S. 393 (1922).

417. Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinions in *Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 615-16 (1996).

latory takings doctrine, but were unserviceable because of their association with the discredited ideology of laissez-faire constitutionalism. "*Mahon* was not similarly tainted, however, because Justice Holmes had been canonized by the Progressives."⁴¹⁸ Thus Holmes' imprimatur provided the "regulatory takings" doctrine with an appropriate Progressive pedigree that enabled it to survive the demise of *Lochnerism*.

Holmes, of course, was a committed positivist who ardently defended "the right of a majority to embody their opinions in law."⁴¹⁹ "The jurists who believe in natural law," he once wrote, "seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."⁴²⁰ In *Mahon* itself, as Brauneis has shown, Holmes rejected the natural law approach that dominated *Lochner*-era jurisprudence, the notion of a constitutionally protected "unchanging ideal boundary between a property owner and the surrounding community."⁴²¹ But he also rejected the formalistic positivist doctrine of "vested rights," which ultimately failed to elaborate a convincing and workable criterion to distinguish rights that were vested from those that were not. Ultimately, Holmes turned to a nonformalist positivism that abandoned the pretensions of the vested-rights theory to establish categorical bright-line rules. In the oracular language of *Mahon*, "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁴²² Thus positive rather than natural law establishes the basic parameters of the constitutional right to property. These parameters may be altered over time by subsequent positive enactments, but any sudden drastic alteration may be held unconstitutional.⁴²³

With the ascendancy of Progressive and Legal Realist attitudes, the Court embraced a clearly positivistic conception of constitutional property rights in a number of decisions. The *locus*

418. *Id.* at 682.

419. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). In Holmes' view, "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Id.*

420. OLIVER WENDELL HOLMES, *Natural Law*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 446 (Sheldon M. Novik ed., 1995).

421. Brauneis, *supra* note 417, at 624.

422. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

423. See Brauneis, *supra* note 417, at 642-64.

classicus of this approach was a due process decision, *Board of Regents v. Roth*, where the Court proclaimed: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."⁴²⁴ If applied consistently to constitutional property jurisprudence as a whole, this approach would counsel deference to the wishes of democratic majorities to define and regulate property rights for the common good.⁴²⁵ For champions of "neutral principles" in constitutional adjudication, it has the effect of defining property rights by reference to objective external criteria. For adherents of originalism, it has the added attraction of returning due process (at least insofar as it protects property) to its original and arguably exclusive focus on process. For its critics, on the other hand, this approach represents a "dramatic departure from settled understandings" that would permit legislatures to contract or expand property rights as they see fit, leading either to "too little or too much" protection for property rights.⁴²⁶

The positivist approach of *Roth* to constitutional property rights has not gone unchallenged. Reflecting its ultimate origins, modern regulatory takings jurisprudence has been "pervasively infect[ed by] substantive due process concepts and principles."⁴²⁷ It was perhaps inevitable, therefore, that the *Lochnerian* idea that the Constitution entrenches forever the late nineteenth-century view of property rights as absolute should reassert itself. The occasion for this development was the so-called "takings revolution" of the Rehnquist Court.

Ingenuously, in *Lucas v. South Carolina Coastal Council*,⁴²⁸ Justice Scalia laid the groundwork for the development of modern regulatory takings jurisprudence by purporting to rely on the positivist approach of *Roth*. In *Lucas*, the court held that a regulation that denies a property owner of "all economically beneficial or

424. 408 U.S. 564, 577 (1972).

425. At least, this seems to be the most natural interpretation of the Court's reference to "existing rules . . . that stem from . . . state law." But the *Roth* Court's language did not completely preclude the argument that once created by state law, property rights cannot thereafter be changed. As discussed *infra*, that is exactly the gloss subsequently placed on *Roth* by Justice Scalia in *Lucas v. S.C. Coastal Council*.

426. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 924 (2000).

427. Karkkainen, *supra* note 415, at 885.

428. 505 U.S. 1003 (1992).

productive use of his land" constitutes a *per se* taking requiring compensation⁴²⁹ *unless* the regulation simply reflects "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."⁴³⁰ In support of this exception, the Court cited *Roth's* assertion that the scope of constitutionally protected property rights can only be defined by "existing rules or understandings that stem from an independent source such as state law."⁴³¹ But rather than holding that the state is free to alter these "background principles" by positive enactments as it sees fit, as this language would seem to suggest, the court strongly suggested that by "background principles" it meant *only* the traditional common law power of the government to abate nuisances or closely analogous phenomena. In order to fall within the background principles exception, the court explained,

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself . . . A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances . . . or otherwise.⁴³²

Lest we get the idea that "or otherwise" might include positive enactments that alter existing property rights in any significant way, the Court immediately added in a footnote:

The principal 'otherwise' that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others.⁴³³

Thus, while purporting to rely on *Roth's* broad positivist conception of constitutional property, the Court effectively cabined this conception within the narrow confines of the nineteenth-century common law of nuisance. With his talismanic invocations of the eternal sanctity of the traditional nineteenth-century common law

429. *Id.* at 1015 (citations omitted).

430. *Id.* at 1029.

431. *Id.* at 1030 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

432. *Id.* at 1029.

433. *Id.* at 1029 n.16 (quoting *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880)).

definition of property, Justice Scalia had pulled the rabbit of natural law from Roth's positivistic hat.

The potential import of Scalia's position did not go unnoticed. Concurring in the judgment, Justice Kennedy suggested that traditional nuisance principles cannot furnish an immutable baseline for constitutional property rights:

The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions . . . The Takings Clause does not require a static body of state property law.⁴³⁴

In a pointed dissent, Justice Blackmun echoed these concerns. He argued that the majority's distinction between common law nuisance rules, which the majority treated as background principles that inhere in the title to land, and legislative determinations, and which the majority apparently did not regard as establishing background principles, was both historically unjustified and intellectually indefensible.⁴³⁵ Justice Blackmun was particularly scathing about Justice Scalia's claim that his approach was rooted in historical understandings of the Takings Clause. It was not entirely clear where these 'historical' understandings came from, Justice Blackmun quipped, "but it does not appear to be history."⁴³⁶ The hallmark of Justice Scalia's pseudo-originalism was precisely the cavalier attitude of his approach, which "seem[ed] to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not."⁴³⁷ Indeed, in his opinion for the court, Justice Scalia openly conceded that "early constitutional theorists did not believe that the Takings Clause embraced regulations of property at all" and that his interpretation of the Clause "is not supported by early American experience," but Scalia airily dismissed such concerns as "entirely irrelevant" on the grounds that "the text of the Clause can be read to encompass

434. *Id.* at 1035 (Kennedy, J., concurring) (internal citations omitted).

435. *Id.* at 1052 (Blackmun, J., dissenting). As Justice Blackmun observed, Justice Scalia purported to establish a value-neutral rule that avoided the pitfalls of determining whether a particular land-use measure conferred a benefit or prevented a harm. However, the nuisance exception did just that. As Blackmun noted, "[n]uisance is a French word which means nothing more than harm." *Id.* at 1055 (Blackmun, J., dissenting) (quoting William Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966)).

436. *Id.* at 1055-56 (Blackmun, J., dissenting).

437. *Id.* at 1060 (Blackmun, J., dissenting).

regulatory as well as physical deprivations.”⁴³⁸ As Justice Blackmun pointed out, Justice Scalia, ignoring early case law and actual historical practice, cobbled together a wholly spurious and anachronistic “historical understanding” by combining nineteenth-century common law principles with twentieth-century constitutional doctrine in an “attempt to package the law of two incompatible historical eras and peddle it as historical fact.”⁴³⁹ From a substantive point of view, the *Lucas* Court’s approach, which confers constitutional sanctity on early judicial determinations but not modern legislative policies regarding what land uses are harmful, was incoherent.⁴⁴⁰

In *Lucas*, the discussion of “background principles” was essentially dicta, because the challenged regulations in that case were promulgated *after* the owner had taken title to the property. But nine years later, in *Palazzolo v. Rhode Island*,⁴⁴¹ the Court was faced squarely with a case in which new regulations were promulgated *before* the owner took title. The State therefore urged that the regulations formed part of the background principles of state law and did not trigger a compensation requirement:

Property rights are created by the State. So, . . . by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.⁴⁴²

But a bare majority on the Court, rejecting this positivist argument, proclaimed: “The State may not put so potent a Hobbesian stick into the Lockean bundle.”⁴⁴³ Instead, the Court held that promulgation of a regulation before the transfer of title was not by itself sufficient to immunize the state from a regulatory takings claim:

We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are pre-

438. *Id.* at 1028 n.15.

439. *Id.* at 1060 (Blackmun, J., dissenting).

440. *Id.* at 1055 (Blackmun, J., dissenting); *see also id.* at 1068-69 (Stevens, J. dissenting) (majority’s holding “effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property”).

441. 533 U.S. 606 (2001).

442. *Id.* at 626 (citation omitted).

443. *Id.* at 627.

sent here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title . . . A regulation or common-law rule cannot be a background principle for some owners but not for others . . . A law does not become a background principle for subsequent owners by enactment itself.⁴⁴⁴

These general statements obviously left the precise scope of the "background principles" doctrine unresolved, and dueling concurrences by Justices O'Connor and Scalia revealed the depth of disagreement that remained among the majority. For Justice O'Connor, the Court's holding did "not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial."⁴⁴⁵ In determining whether a regulatory taking has occurred, reasonable investment-backed expectations remain critical, and thus "the regulatory regime in place at the time the claimant acquires the property" is an important factor in determining whether a taking has occurred.⁴⁴⁶ This approach was echoed in dissenting opinions.⁴⁴⁷ Justice Scalia, on the other hand, sharply disagreed:

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance") should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.⁴⁴⁸

Although the *Palazzolo* Court rejected the pure positivist approach under which states have plenary powers to redefine property rights, it did not clearly articulate the precise limits on such powers. Subsequent decisions have done little to clarify the issue. Indeed, the following year, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, a majority of six Justices expressed considerable sympathy for Justice O'Connor's view that

444. *Id.* at 629-30.

445. *Id.* at 633 (O'Connor, J., concurring).

446. *Id.* (O'Connor, J., concurring).

447. *See id.* at 645 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 654-55 (Breyer, J., dissenting).

448. *Id.* at 637 (Scalia, J., concurring) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)).

the "temporal relationship between regulatory enactment and title acquisition" should play an important role in the takings analysis.⁴⁴⁹

Although *Tahoe-Sierra* did not directly involve an application of the *Lucas* "background principles" doctrine, the opinion did suggest that a majority of the Court rejected Justice Scalia's view that early common law nuisance principles established an immutable baseline for constitutional property rights. Thus, if *Lucas* and *Palazzolo* indicate that the Court is unwilling to embrace a pure positivist approach under which the states are completely free to alter property rights without paying compensation, *Tahoe-Sierra* suggests that they nevertheless retain considerable latitude to re-define or limit such rights; with the passage of time, such redefinitions and limitations may themselves form part of the background principles against which constitutional claims must be evaluated. Thus, the Court's most recent pronouncements on regulatory takings suggest a turn back from a natural toward a conventional view of property rights.⁴⁵⁰

A similar result is apparent in the Court's most recent pronouncement on the doctrine of public use, *Kelo v. City of New London*.⁴⁵¹ Despite the widespread outcry over the result in this case, the Court's decision to uphold the use of eminent domain in the transfer of land from one group of private owners to another within the context of a comprehensive economic development plan did not represent a radical departure from prior precedent.⁴⁵² Modern Supreme Court decisions have repeatedly interpreted the phrase "public use" to refer broadly to public utility rather than direct public access; it is sufficient that the taken property be employed in a way that is *of use to* the public, but it need not necessarily be *in use by* the public.⁴⁵³ The "public utility" interpretation is also closer than the "public access" interpretation to the original

449. 535 U.S. 302, 335 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

450. Cf. Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 753 (2004) (arguing that the *Tahoe* decisively rejected the "mythical" view that property rights are "concrete, pre-political, [and] self-defining," and strongly recognized the importance of the public interest).

451. 545 U.S. 469 (2005).

452. See, e.g., Thomas W. Merrill, *Six Myths about Kelo*, PROB. & PROP., Jan.-Feb. 2006, at 19, 19-20.

453. See, e.g., *Berman v. Parker*, 348 U.S. 26, 33-35 (1954) (upholding condemnation of a department store that was not itself blighted to make way for private urban renewal project); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239-43 (1984) (upholding condemnation of large landholdings in order to reduce oligopolistic concentrations of ownership).

understanding of “public use,” which arguably did not impose any substantive limitation on the government’s power to expropriate at all.⁴⁵⁴

The four dissenting Justices in *Kelo*, on the other hand, relied heavily on a natural law conception of property as an absolute right to support their cumulative view that “public use” must be interpreted to mean “use by the public.” More than two hundred years after *Calder v. Bull*, the old debate between Justices Chase and Iredell over whether property is a natural or a positive right is still very much alive. Both Justice O’Connor’s dissent (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) as well as Justice Thomas’ separate dissent invoked Justice Chase’s argument that redistributive action by the government violates natural law.⁴⁵⁵ Ultimately, however, the dissenting Justices failed to articulate a workable alternative standard for public use and to distinguish prior precedents in a convincing manner.

Justice O’Connor proposed a three part test, under which a taking is for “public use” if (1) it transfers the property to public ownership, (2) it makes the property available for use by the public, or (3) it is necessary to eliminate the infliction of “affirmative harm on society.”⁴⁵⁶ But this test utterly failed to distinguish those uses that Justice O’Connor regarded as public from those she considered private. For example, she could not explain why in her view a stadium satisfied prong (2), but a hotel or a shopping mall did not.⁴⁵⁷ Moreover, as Justice O’Connor herself conceded, prongs (1) and (2) were “too constricting and impractical” to provide a useful standard or to account for a long line of settled takings

454. See generally Harrington, *supra* note 269.

455. See *Kelo*, 545 U.S. at 494 (O’Connor, J., dissenting) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)); see also *id.* at 510-11 (Thomas, J., dissenting) (quoting *Calder*, 3 U.S. (3 Dall.) at 388). The majority opinion also quoted Justice Chase. *Id.* at 478 n.5 (quoting *Calder*, 3 U.S. (3 Dall.) at 388). In addition, the majority opinion quoted Justice Iredell. *Id.* at 487 n.19 (quoting *Calder*, 3 U.S. (3 Dall.) at 400 (Iredell, J., concurring)).

456. *Id.* at 497-500 (O’Connor, J., dissenting).

457. Compare *id.* at 498 (stadium is public use) with *id.* at 503 (hotels and shopping malls not public use). As the majority observed, the attempt to develop “use by the public” as a workable standard proved unworkable in the nineteenth century because of just such problems. See *id.* at 479-80; see also *id.* at 479 n.7 (quoting *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 410 (1876) (“A hotel is used by the public as much as a railroad.”)).

cases.⁴⁵⁸ In an effort to accommodate such precedents, Justice O'Connor introduced prong (3). But the third prong similarly failed to distinguish the case at bar from prior precedents upholding takings for similar purposes.⁴⁵⁹ Like her predecessors from the early nineteenth century forward, Justice O'Connor failed to fashion a workable judicial standard from the amorphous civilian natural-law concept of "public use."

Strangely, although Justice Thomas joined Justice O'Connor's dissent, he clearly did not agree with it. Although he accepted O'Connor's prongs (1) and (2), he emphatically rejected prong (3). In his separate dissent he wrote that the Public Use Clause "allows the government to take property only if the government owns, or the public has the right to use, the property."⁴⁶⁰ He thus pointedly ignored the "affirmative harm" prong that Justice O'Connor concocted in her unconvincing effort to rescue prior precedents. For Justice Thomas, those precedents, and indeed almost every public use decision since at least 1896, were simply wrongly decided.⁴⁶¹ In his view, the Court should simply ignore these decisions and recognize that "the Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right."⁴⁶²

Justice Thomas reaches his conclusion that the Constitution embodies his preferred theory of natural rights only by disregarding the amply documented conflicts of opinion in the eighteenth century over whether property is a natural right, and if so, in what sense. He completely ignores early practice and case law, which provide the clearest insight into the way the Takings Clause was likely understood, because they utterly undermine his preferred interpretation. Instead, he turns to more indeterminate sources such as dictionaries and treatises, which he distorts and oversimplifies in order to torture the desired result from the text."⁴⁶³ Al-

458. *Id.* at 498-99 (O'Connor, J., dissenting). In particular, they could not account for *Berman* nor (embarrassingly for Justice O'Connor) *Midkiff*, which she herself had authored.

459. After all, if the non-blighted department store at issue in *Berman* could be characterized as "harmful," then so could the private property at issue in *Kelo*. Neither was harmful in itself; each could be characterized as harmful only insofar as it stood in the way of an urban renewal project.

460. *Kelo*, 545 U.S. at 508 (Thomas, J. dissenting).

461. *Id.* at 515-20 (Thomas, J. dissenting).

462. *Id.* at 510-11 (Thomas, J. dissenting) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

463. Justice Thomas relies heavily on Eric Claeys, *Public Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877 (2004). See, e.g., *Kelo*, 545 U.S. at 511-13

though Samuel Johnson's dictionary of 1773 indicates that that "use" had essentially the same broad range of meanings in 1773 as it does today, he concludes that it could not have a broader meaning in the Takings Clause because it arguably had a narrow meaning in Article I of the 1787 Constitution.⁴⁶⁴ He simply ignores abundant evidence to the contrary from contemporary practice.

For final confirmation, Justice Thomas turns to Blackstone. According to Blackstone, the law does not permit the government to take private property without the owner's consent "even for the general good of the whole community."⁴⁶⁵ Ergo, the Framers rejected the concept of government expropriation to secure a public benefit. But, in the passage Thomas quotes, the example Blackstone cites is the taking of property to build a public road. As Thomas construes the passage, it would prohibit all takings of private property, even those for "use by the public," which Thomas argues are permitted. Moreover, Blackstone's statement, taken literally and out of context, is clearly false as a description of the actual practice in both England and America at the time. Blackstone clearly did not intend his statement to be taken literally, for in the very same paragraph, he hastens to add, "In this and similar cases the legislature alone can, and indeed frequently does interpose, and compel the individual to acquiesce."⁴⁶⁶ When read within its original context, then, Blackstone says nothing about the purposes for which the government may take property, and certainly does not support Justice Thomas' theory of public use.

Our modern jurisprudence of the constitutional right to property retains little of the richness of the early debates that formed its original matrix. It is increasingly characterized by a proliferation of inconsistent yet partially overlapping balancing tests and categorical rules, arid and seemingly pointless distinctions between expropriations and exactions, and unresolved questions about conceptual severance in the context of partial and temporary takings. What is conspicuously lacking is a deep consideration of the purposes that property rights serve, and especially of the social dimen-

(Thomas, J. dissenting). Claey's disparages scholarship that attempts to elucidate original understanding through an analysis of actual practice and case law. He suggests that it is preferable to "shift the emphasis away from colonial practice and later cases to dictionary definitions and moral theory influential at the [time of the] founding." See Claey's, *supra*, at 882.

464. *Kelo*, 545 U.S. at 508-09; cf. Claey's, *supra* note 463, at 896-97.

465. *Kelo*, 545 U.S. at 510 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *135).

466. 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

sion of the right to property. Paradoxically, an appreciation of richness of the debate over the constitutional right to property is most absent from the jejune analyses of the court's "originalists." By and large, the Justices have simply projected their own policy preferences onto the Constitution without examining the historical record in any detail.

V. CONCLUSION

The incoherence of our modern jurisprudence of property rights reflects a profound lack of consensus about their basis. The notion that the right to property is natural, pre-political, and inviolable has coexisted uneasily with the notion that it is conventional and subject to social regulation and redefinition. This tension reflects an ancient debate that seventeenth- and eighteenth-century theorists had not succeeded in resolving. For Grotius and Pufendorf, the right to property was based on a purported social contract whose actual existence they signally failed to demonstrate. Locke sought to avoid the difficulties of their contractarian approach by grounding the right to property in the natural right to one's person and one's labor, only to fall back on the contract theory to explain the institution of property in civil society. Locke thus ended up seeking to justify positive property rights, including slavery, that were flatly contradictory to his initial natural-law premises. Rousseau maintained that property is a social, not a natural right, and is strictly subordinate to the public interest; but paradoxically he insisted that it will never be in the public interest to violate that right.

Thus, it is not surprising that leading figures in the revolutionary debates on both sides of the Atlantic took a wide range of positions on this question. Jefferson vacillated between the positivist and *jusnaturalist* approach. In France, actors at opposite ends of the political spectrum espoused both views. Jacobins and monarchists alike proclaimed their attachment to the sanctity and inviolability of property as a natural right, yet both the radical Robespierre and his reactionary Thermidorian adversaries insisted on its purely social character.

Madison and Sieyès, both central figures in the emergence of the modern constitutional right to property, were the most ardent disciples of Locke among the eighteenth-century framers. Their political projects reflected all of the unresolved tensions and inconsistencies in Locke's thought. On the one hand, they sought to

establish a system of government based on the consent of the governed in order to safeguard human liberty. But, like Locke, they saw protection of existing concentrations of property from the depredations of the majority as the central purpose of government. Thus, they focused their efforts on contriving devices to stymie democracy and limit political participation, whether through filtering mechanisms of representation, restrictions on the franchise relegating the propertyless to the status of "passive citizens," or, in Madison's case, protections for the property rights of slaveholders. Such structural mechanisms were to be the primary means of protecting the rights of property; beside them the formal guarantees of the Fifth Amendment or of Articles 2 and 17 of the French Declaration were secondary and largely hortatory.

The antidemocratic structural mechanisms championed by Madison and Sieyès to protect propertied minorities are no longer defensible in our modern legal culture. As a result of the hard-fought struggles of the nineteenth and twentieth centuries, modern equality is not simply a matter of the protection of a narrow set of private-law rights of a narrowly circumscribed class of rights-holders, but a universal principle, extending to political and perhaps even social rights. The central concern of the Takings Clause of the Fifth Amendment with equal treatment of property holders would appear to be subsumed in and largely superseded by broader principles of equal protection enshrined in the Fourteenth Amendment and subsequent jurisprudential developments. The Bartolist-Blackstonian conceit that the rights of the property owner are absolute and inviolable, which was never more than a rhetorical trope, seems less and less apt as property rights have become ever more subject to regulation, redefinition, and redistribution.

The periodic invocation of this ahistorical conceit by reactionary activist judges to invalidate social, economic and environmental legislation has proved, in the long run, not only ineffectual but self-defeating. The *Lochner* Court's injudicious invocation of substantive due process to protect *laissez-faire* capitalism only ended up weakening the prestige of the Court and of judicial review itself both domestically and internationally, culminating in the ignominious "switch in time" of 1937. Seemingly oblivious to this lesson and to the warnings of Lambert, the French *Conseil constitutionnel* in 1982 likewise elevated the non-textual freedom of enterprise above textual guarantees of social rights, undermin-

ing its fragile legitimacy, only to retreat from this approach in more recent decisions.

Similarly, the "takings revolution" of the late twentieth century heralded by *Lucas* and *Palazzolo* purported to elevate the nineteenth-century common law property rules to the status of immutable constitutional principles, but more recent decisions in the areas of both regulatory takings and public use suggest that a majority on the Court have little appetite for a full-fledged rehabilitation of a constitutional property jurisprudence rooted in natural law. Those who would seek to erect a jurisprudence of constitutional property rights on a neo-Lockean theory of natural right have never really overcome the failure of that theory to justify the existing distribution of property. Nor do they seem prepared to draw any lessons from the way that their theory, ostensibly based on an ideology of human rights and self-government, has been deployed by its most ardent champions to justify the denial of those rights. They ignore entirely the insights of a competing vision of property as a conventional right created by society to serve the public good, and therefore subject to regulation and redefinition in order to maximize both the autonomy and well-being of all of its members.